THE JOINT HINDU FAMILY:
its evolution as a legal institution

by

Günther Dietz Sontheimer

(Rechtsreferendar, University of Tübingen, Germany)

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ABSTRACT

The institution is based on the concept that a nucleus of ancestral property and accretions to it do not exclusively belong to one person, but form the basis for the spiritual and economical welfare of family members normally within a circle of three generations. In traditional belief even past and future generations have an "interest" in the property of those who enjoy the property for the present. This concept was based on patriliny. Patriarchy existed but did not develop into the strict Roman patria potestas. It rather served to emphasize the rights of the father in the face of premature assumption of powers by the son. The core of the institution is the relationship between father and son. The son is the father reborn and inherits not only rights to enjoy property, but also responsibilities towards all family members.

The admixture of customary law in the Dharmaśāstras brought modifications and accretion of rules. Thus the value of ancestral land furthered the rights of the son. Rights of females in property competed with the view that women should be only maintained which includes marriage expenses. The customary elementary family with community of ownership between husband and wife occurs in śāstric texts but recedes in the face of the pivotal relationship

of father and son which constitutes a kind of "trust". After the death of the common ancestor the law always anticipated partition and formation of new smaller joint families unless brothers remained joint out of convenience or necessity.

In Anglo-Hindu law the traditional institution may have suffered from over-specialisation of rules, deficient selection of application of śāstric material, and conflicting decisions. But judge-made law has essentially supported greater individuality without destroying basic jointness and has in fact supported the preservation of the joint family. Even legislation has not abrogated the basic jointness between agnates and especially between father and son. This process represents an example of the adaptation of a traditional legal institution to modern demands.

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ABBREVIATIONS

A.I.R.	All India Reporter
Apar.	Aparārka(Ānandāśrama Ser., 2 vols., paged and cited continuously)
Ap.-dh.sū.	Āpastambadharmasūtra
Arthaś.	Arthaśāstra of Kauṭilya(cited according to text and transl. by R.P.Kangle)
Baudh.-dh.sū.	Baudhāyanadharmasūtra
BSOAS	Bulletin of the School of Oriental and African Studies
Bṛh.	Bṛhaspati
Dh.K.,Vy.K.	Dharmakośa,Vyavahārakāṇḍa(3 parts, paged and cited continuously, in double columns)
Gṛ.sū.	Gṛhyasūtra
HDh	History of Dharmaśāstra(Kane)
HLS	Hindu Law in its Sources(Jha)
I.A.	Law Reports, Indian Appeals
I.L.R.	Indian Law Reports
Jai.Br.	Jaiminīya Brāhmaṇa
Jātaka	Jātaka
JESHO	Journal of the Economic and Social History of the Orient
JRAS	Journal of the Royal Asiatic Society
Kāth.Saṃ.	Kāṭhaka Saṃhitā
Kāty.	Kātyāyana
Kṛtya-kal.	Kṛtya-kalpataru(Vyavahāra-kāṇḍa, if not stated otherwise)

M.L.J.	Madras Law Journal
Maitt.Saṃ.	Maitrāyaṇi Saṃhitā
Moo.I.A.	Moore's Indian Appeal
RgV	Ṛgveda
Sar.-vil.	Sarasvatī-vilāsa(Foulke's ed. and transl.)
SBE	Sacred Books of the East
Sm.	Smṛti
Sm.ca.	Smṛti-candrikā
Śaṅkha-L.	Śaṅkha-Likhita-dharmasūtra
Supr.Ct.Jour.	Supreme Court Journal
Univ.Ceyl.Rev.	University of Ceylon Review
Vas.-dh.sū.	Vasiṣṭha-dharmasūtra
Vi.-ra.	Vivāda-ratnākara
Vy.K.	Vyavahāra-kāṇḍa
Vya.-ma.	Vyavahāra-mayūkha
Yājñ.	Yājñavalkya
ZVR	Zeitschrift für vergleichende Rechtswissenschaft

PREFACE

The existence of the joint Hindu family as a legal and social institution has been deplored as antiquated and backward. Zealous reformers had little sympathy with an institution which in their eyes seemed to be opposed to all progress of society. Already in 1901 reformers would criticise the institution emphatically. It was said: "The tendency of all progressive nations is to allow the fullest scope for the expansion of the latent powers of the individual and the fullest liberty for him to follow whereever his powers lead him".[1] Especially the subordinate status of women and their limited rights in property were the target of movements for social legislation. In 1934 a writer expressed a very widely held conviction about the disadvantage of the joint family system when he says: "The joint family system is to be condemned. It creates idlers in the family and discourages the enterprising by its restrictions cautious distribution of funds for domestic business purposes. It provides a sort of 'dole' which encourages 'unemployment'. It is this system which encourages the living of fifty or more members of one family in a small ill-ventilated, unsanitary dwelling-place with no privacy or seclusion and with no chance for thinking, studying or

[1] G.Subramania Iyer, The Hindu Joint Family System, in: Yajneswara Chintamani (ed.), Indian Social Reform, Madras, 1901, at p.115.

developing individuality. The only 'recreation' of the members consists in quarelling over their respective shares".[1]

On the other side stood the sympathisers with the joint family system, the "traditionalists", who believed in the spiritual and material merit of joint living, subordination to the eldest common ancestor, jointness of property and common mutual sharing of fortune and misfortune.[2]

It is generally believed that the recent legislation of the year 1956, if not judicial decisions before that, have accelerated the impending extinction of the joint family. Individualism, urbanization, and industrialization have contributed, it is maintained, to replace to a great extent the joint family by the nuclear family.

This presumes that the essence of a joint family ~~are~~ is a conglomeration of relatives or <u>one</u> household, i.e.a residential unit and that the large patrilineal household, joint living, commensality, property held in common, and participation in common family worship ~~was~~ always the rule in Indian life.[3]

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[1] J.C.Durai, "The Hindu Law; should it be reformed?", <u>Journ. of Comp. Legislation and Intern. Law</u>, 16 (1934) 140-4.

[2] See e.g. G.C.Sarkar Sastri, <u>Hindu Law</u>, 3rd ed., 183-6.

[3] See Irawati Karve's definition, <u>Kinship Organization in India</u>, Poona 1953,10. For a collection of sociological definitions see T.N.Madan, "The joint family: a terminological clarification", <u>Intern.Journ. of Comp.Sociology</u>, 3(1962) 7ff. The author considers joint rights in property and obligations as the criterium for the existence of a joint family. Cp.also Kane's definition (<u>HDh</u>.,III,590f.): "A joint family consists of all males lineally descended from a common ancestor and includes their wives and unmarried daughters... Under the Mitākṣarā a Hindu coparcenary so-called is a much narrower group than the joint family. It comprises only those males

But there is no need for a joint family to live jointly in one house and often smaller joint families, e.g. a couple with an adult married son, or even a minor son, because, he has an interest by birth in the father's property, form a part or a branch of larger joint family the branches of which may have separate residence though they are joint in status with the larger joint family. Nor is it necessary to have only one receptacle of property. The institution of self-acquisitions as a separate entity developed in Anglo-Hindu law supports separate living without effecting severance of status and partitioning the ancestral property or a nucleus of common property. In the customary law of some castes we find arrangements where brothers or father and sons are separate for some purposes.[1]

Moreover ties of kinship are still strong and support the tendency to jointness which is strengthened by the ideal respect to the head of the family, the feeling of mutual responsibility[2], ancestral rituals and cults, the sentimental

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3 (Cont'd. from previous page)
who take by birth in interest in the joint or coparcenary property, i.e. a person himself and his sons' sons, and sons' grandsons form for the being a coparcenary.

[1]See Derrett, "The History of the Juridicial Framework of the Joint Hindu Family, Contr. to Ind.Sociology, 6(1962)17-47.

[2]See e.g. Richard D. Lambert, Factories, Workers and Social Change in India, Princeton, 1963.56: the industrialization had the effect that the relatively high income of the factory workers draws added dependents and thus larger families. See also e.g. Jyotirmoyee Sarma, "The Nuclearization of Joint Family Households in West Bengal", Man in India, 44 (1964) 193-206.

and economic value of ancestral property, and the tendency of families to hold together in order to preserve prestige and identity within the wider kinship group and caste, and the physical and emotional security which joint family life provides.

The larger household as an incident of the joint family may be disappearing in modern life being a feature of the traditional society whether in India or e.g. in Africa where joint families occur. But the essence of the joint Hindu family may be found in the concept that a man's property serves family purposes and that a father and son own the property rather as a kind of trust for many others besides themselves.[1]

This notion ~~which~~ took firm root in Indian legal texts — contrary to the development of Roman law where individual ownership with full testamentary power, superseded the earliest conception of 'co-ownership'. In classical Roman law individual ownership as evident from the freedom to make a will had superseded all inherent rights of the descendants; the only survival of a limitation on the father's powers consisted of a formal requirement that in a will any or all sui heredes whom the testator wished to be disinherited had to be mentioned expressis verbis in an

[1]See J.D.M. Derrett, "The Law and The Predicament of the Hindu Joint Family", The Economic Weekly, February 13,1960, 305-311, 311.

appropriate clause (exheredatio). This limitation probably dates back to very early times when the pater familias was rather the administrator than the absolute owner of the family property and when the sui heredes were in a certain sense co-owners even in the lifetime of the father. At that time the testamentum was a recent innovation and it had still to be approved by the pontifices and sanctioned by the comitia calata. In the earliest period of Roman law there was apparently no succession or transfer of dominium, nor a mere expectancy of the male descendants, as they were in a position of quasi-owners of the common property along with the father and at his death they succeeded to his spiritual and economical position and inherited his rights and duties, including the right of the administration of property which had become now 'free' (libera administratio).[1]

Indian legal texts have gone beyond this concept for the benefit of the family. We have concentrated on the genesis and development of the joint Hindu family as a property-acquiring, -managing, and -enjoying unit centering around the relationship between father and son according to traditional law. Subsequently we have indicated with the help of a few typical illustrations from the mass of

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[1]See Paulus, Digestes XXVIII,2,11 in Institutes of Gaius, ed. and tr. F. de Zulueta, pt.2, comm., 97. The famous passage of Gaius is: sed sui quidem heredes ideo appellantur, quia domestici heredes sunt et vivo quoque parente quodammodo domini existimantur. Inst.II, 157.

decisions the adaptation of the institution to modern conditions at Anglo-Hindu law and modern legislation.

It remains for me to express thanks to the staff of the SOAS Library who were exceedingly helpful and indulgent. — I am especially grateful to Professor J.D.M. Derrett whose teaching and works on Hindu law have helped me immensely and whose unfailing and patient guidance was of great encouragement to me.

CHAPTER I

FAMILY LIFE AS SHOWN IN PRE-LEGAL TEXTS AND THE DHARMAŚĀSTRA

I. Types of Families and Membership.

(1) The Patrilineal Family according to Pre-legal Texts.

Brāhmaṇical and Buddhist texts of the pre-legal period, that is to say before the first Dharmasūtras and Smṛtis came to be composed and had found a wide acceptance in society, generally reflect the existence of a patrilineal family consisting of father and mother, sons and their wives, including unmarried daughters and children of sons, and perhaps occasionally widowed or divorced daughters, thus forming a unit of three generations of family members. This circle of family members is already indicated in the often-quoted marriage hymn of the Ṛg-veda when in the course of the prayer welcoming the newly-married wife at the entrance of her husband's house it is said:

> "be a queen to your father-in-law,
> be a queen to your mother-in-law,
> be a queen to your husband's sisters,
> be a queen to your husband's brothers."[1]

The descendants in the male line normally included two

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1. 10, 85, 46; tr. follows H.H. Wilson's Ṛig-Veda-Sanhita, IV, 1952; Poona ed., 4, 587:
saṃrājñī śvaśure bhava saṃrājñī śvaśvrām bhava/ nanāndarī saṃrājñī bhava samrājñī adhi devṛṣu//46//

generations, as we notice in the earlier part of the hymn.[1] In the Atharva-veda a passage shows the circle of family members a particular member could envisage or have active memory of:

> "Self, father, son, grandson, grandfather, wife, the mother that bore me, those who are dear, them I call upon."[2]

This circle of five generations differs from the later conceptional unity of seven generations consisting of three generations of deceased agnatic ancestors and four generations of living agnates based on the notion of sapiṇḍaship. The great-grandfather is hardly referred to in early writings except in the funeral hymn of the Atharva-veda (4,35,75-80) where he is invited as one of the ancestors along with father and grandfather. Similarly the third male descendant is hardly referred to and there are no definite words for descendants in different generations except that the term meaning the first male descendant may be repeated to suggest

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1. 10,85,42[586]:
ihaiva staṃ ma vi yauṣṭaṃ viśvamayurvyaśnutaṃ/ krīḷantau putrairnaptṛbhir-modmānau sve gṛhe//42// Geldner, Harv. Or.Ser., XXXV, 273, translates: "Bleibet immerhier, trennet euch nicht, erreichet das volle Lebensalter, mit Söhnen und Enkeln spielend, im eigenen Hause fröhlich!" Atharva-veda 14, 122 is similar.

2. Ath. -v. 9, 5,30. Translation follows Whitney's, Harv. Or. Ser., VII, 1, 716. The Hoshiarpur ed., ii, 1186, reads: ātmānaṃ pitaraṃ putraṃ pautraṃ pitāmahaṃ/ jāyāṁ janitrīṁ mātaraṃ ye priyastānupa hvaye//30//.

the descendants in the first and second generation.[1] The authority of the father-in-law over the wife of the husband is stressed in the Brāhmaṇas and confirms the impression that extended families were the rule.[2]

The texts of the Pāli-Canon likewise show that the family unit was normally larger than the nuclear family and to illustrate this we may refer to a passage from the Aṅguttara Nikāya where the newly-married woman is said to feel "extreme fear and bashfulness in the presence of her husband's mother, his father, and domestic servants."[3]

In the Vinaya Piṭaka we find the female members of an extended patrilineal family and other female members of the household classified according to their rank and position within the family, namely, the women of the family (kula ittī), the daughters of the family (kula dhītāyo), the young girls of the family (kula kumāriyo), the daughters-

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1. Kapadia, Hindu Kinship, 122f., where further references are given and the terms napāt (naptṛ), toka and tanaya are discussed. Kapadia, ibid., comes to the conclusion that "so far as the Vedic Aryans is concerned, the normal family unit consisted of three generations."
2. Aitareyabrāhmaṇa 3,22,7; [I,508]:
   ... tadyathaivādaḥ śnuṣāḥ śvaśurāl-lajamāne nilīyamānaityevameva ... Keith, Harv.Or.Ser., XXV, 179, translates:
   "... just as in this world a daughter-in-law keeps hiding in modesty before the father-in-law". Cp. Taittirīyabr. 2,4,6,12. Maitrāyaṇī Saṃhitā 2,4,2. Kāṭhakaṃ Saṃ. 12,12. (cit. in Kane, HDh, II, 793. The passages are collected in W. Rau, Staat und Gesellschaft im alten Indien, 42.
3. II, 78; N.K. Wagle, Society at the Time of the Buddha, Ph.D. Thesis, London, 210.

in-law of the family (kula suṇhayo), and the women slaves (kula dāsiyo).[1] In the same text a household of gahapati is described to include his wife, his son, son's wife, slaves and domestic servants.[2]

(2) Kula (Extended Family or "Gens") and Kulya (Kinsman, Relative).

The term which is frequently used in the Brāhmaṇas as well as in the Pāli-Canon to describe an extended family or large household is kula and it may be worthwhile to trace the meanings and implication of the term in various contexts. Even in late legal texts the term occurs occasionally in the sense of 'joint family' or 'extended household'.[3] In the Dīgha Nikāya it is stated that father and mother 'desire a son to be born in the family' so that he may fulfil the

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1. III, 120; Wagle, 120. kula dhītāyo are most probably widowed or divorced daughters who might return to their father's kula. Cp. Rau, 42. Arthaś. 3.3.13. In the Dharmaśāstras the wife's rights in her father's family are neglected.
2. I, 240; Wagle, 211.
3. Kāty. 874: kule vinīta-vidyānāṁ bhrātṛṇāṁ pitṛto'pi vā/
śaurya-prāptaṃ tu yad-vittaṃ vibhājyaṃ tad bṛhaspatiḥ//
Tr. [310]: "Bṛhaspati declares that the wealth acquired by valour (in battle) by brothers who were instructed in the family or by the father is liable to be divided (among all members of the family)". Cp. Bṛhaspati 10,56 [107]: "Notice having been given to the debtor's family ..." (ṛṇi-kule).

manifold functions which are attached to the position of a son.[1] The male descendants of a kula were known by the generic name kulaputta in the Pāli-Canon, whereas the head of this patrilineal group was known as kulapati or kula-jeṭṭha,[2] who may have been a senior head of a larger group than the extended family, namely an agnatic lineage or 'gens' into which the kula may grow eventually.

In the Brāhmaṇas, kula has the meaning of a family living in a mess community comprising besides the members of the family brāhmaṇical guests and female slaves.[3] That a kula may eventually comprise too many members and become unwieldy is perhaps reflected in a passage from the Jaiminīya-brāhmaṇa:"then (in the golden age) one bowl of rice was sufficient for a kula."[4] Thus after a certain time, the kula would split up and the members of the original kula establish separate households. Here the term kula may assume the meaning of an extended kinship group, or a patrilineal 'clan'. This accounts for the vagueness and ambiguous connotations with which the term is used in the legal texts. Thus in the Arthaśāstra which is one of the earliest texts reflecting

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1. III, 189.
2. Wagle, 240.
3. Pañcaviṃśa-brāhmaṇa 5,6,9; Śatapatha-brāhmaṇa 2,1,4,4. In the Buddhist scriptures monks appear as dependants on households (kula) for their livelihood. Samyutta Nikāya (II, 200) and Vinaya Piṭaka (II, 83, 248-9).
4. 2,266: api ha smaiko vrīhipātraḥ pakvaḥ kulāyālaṃ bhavati. Rau, 37, translates: "Früher (in golden Zeitalter) war eine Schüssel gekochten Reises genug für ein kula."

customary rules, we find the term represented in the compound śvaśura-kula = 'father-in-law's family or house',[1] pati-kula = 'the wife's husband's family or residence,[2] and jñāti-kula = 'family, or residence, of the kinsmen of the wife, or the agnatic lineage to which the wife originally belonged.[3] Yet a kulya, a member of the kula,[4] is not necessarily a sapiṇḍa, that is one of the members of the mess community who have claim to the property of a deceased within this group and who are members of the unit of four generations of agnates according to the Arthaśāstra.[5]

In an ancient text attributed to Devala, which closely follows the Arthaśāstra in this respect, four generations of male agnates 'undivided' or 'reunited' (actually 'living together after having been divided') are said to participate in a partition, and it is made clear that up to the fourth degree kulyas would be sapiṇḍas which clearly indicates that the kulyas may comprise a much wider circle of agnates and that the notion of sapiṇḍaship was

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1. 3,3,6 [100; tr.223]
2. 3 4 1 102; tr.236].
3. 3.4.10, 13 [102, tr. 237].
4. Arthaś. 3,9,3 [109]: samanta-catvārimśat-kulyeṣu ... [tr.253]: "... in the presence of members of forty neighbouring families...")
5. 3.5.5-6 [104] In 3.4.40, the kulya ranks behind the sapiṇḍa who has a preferable claim to marry the deceased's widow after the full brother or half-brother. 3,6,22 [106; tr.246].

utilised to distinguish the rights of the members of an undivided patrilineal joint family against the claims of the wider agnatic kin:

> "Among kulyas that are undivided or who are living together after being divided, there may be a partition up to the fourth degree; so far would kulyas be sapiṇḍas; beyond that there would be difference of piṇḍa; they hold that the partition of property and the piṇḍa go hand-in-hand."[1]

A passage in the Baudhāyana-dharmasūtra shows that the concept of sapiṇḍaship had superseded the term kulya, sapiṇḍa meaning a member of the undivided family who takes a share or inherits the property in preference to kulyas whom Baudhāyana calls sakulyas: "The great-grandfather, the grandfather, the father, oneself, the uterine brothers, the son by a wife of the same caste, the grandson, the great-grandson - these undivided dāyādas they call sapiṇḍas; the divided dāyādas they call sakulyas..."[2] At some stage of the development of the Smṛtis, the terms sakulya and sagotra,

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1. Jha's tr., HLS, II, 338. avibhakta-vibhaktānāṁ kulyānāṁ vasatāṁ saha/bhūyo dāya-vibhāgaḥ syād ā caturthād iti sthitiḥ// tāvat-kulyāḥ sapiṇḍāḥ syuḥ piṇḍa-bhedas-tataḥ paraṃ samam-icchanti piṇḍānāṁ dāyārthasya vibhājanam// Dh.K. 1203a. Cp. also Bṛh.Sm. 26,14 and fn.211. Arthaś. 3.5.4-6.
2. Baudh. dh.sū. as cit. e.g. in Kṛtya-kal. 751, Dh.K.1465f. Sapiṇḍas are the primary heirs after whom the sakulyas inherit according to Manu 9, 187.

i.e. member of the patrilineal clan, must have been distinguished and a sagotra must have been a member of a wider group. According to the Devala-smṛti the partition of property of a Brāhmaṇa who has only a pāraśava son (from a Śūdra wife) has to be as follows: one third to the pāraśava son, the remainder to his sapiṇḍas or near sakulyas; in the absence of these the property shall go to the father's ācārya or pupil; if these are absent the property should be made over to persons belonging to the same gotra.[1] After the term kulya had lost its importance for explaining the property relations within a family, especially in respect of partition of dāya, it retains its residual meaning as a kinsman and heir after the sapiṇḍas.[2]

Kula is eventually mainly used while referring to a well-known or noble family or 'gens'.[3] It may even lose its original meaning of a patrilineal family or agnatic lineage and according to a passage of Śaṅkha, if at a partition between agnates or members of a gotra any doubt

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1. Devala, as cit. in the Kṛtya-kal. 702f. (attr. to Bṛhaspati in Vi.ra. 538). The text attributed to Devala seems to be related to Arthaś. 3,6,22-24 [103].
2. Manu 9, 187.
3. Manu 7, 63,77,141; 10,60. Bṛh.Sm. 17,8-9 [151]; Kāty. 347,927; cp. kulinārya, 965. Some further uses of kula may be noted here; kula-dharma (Manu 8,40) is, according Kāty. 85, that which has come down hereditarily in a gotra as the dharma (or custom) to be observed by the members of the family. Kula as a court of first instance is mentioned in the Yājñ.Sm.(2,30), Nārada Sm. (1,7), Bṛh.Sm. (17,17), and Kāty. 821; cp.496). Kulāni is a group of impartial persons: madhyastha-puruṣāḥ. Medhātithi on Manu 8 (second interpretation).

arises, the kula should be witness. Here kula can apparently not be the agnatic lineage as the term gotra already includes the agnatic lineage. The commentators understand kula as cognates and it was probably a neutral body constituted by cognatic relations.[1]

(3) A Comparison of the Terms Kula and Kuṭumba.

Whereas kula means primarily the extended patrilineal household and refers to birth and relationship, kuṭumba, which is connected with kuṭi = cottage, hut,[2] refers primarily to a nuclear family, to dwelling and the household as an economic unit, perhaps within the wider framework of a kula. In the Arthaśāstra a widow who desires to remarry one of her husband's brothers is described as kuṭumba-kāma, "desirous of having a family", and is allowed to keep the gifts made by her late husband and her father-in-law.[3] This presumably refers to a family within an extended family. In the Nārada-smṛti a brother is referred to who maintains the

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1. Śaṅkha as cit. in Dāyabhāga, 229f., etc. Jha. HLS, II, 621f. Dh.K.1575a.
   gotra-bhāga-vibhāgarthe sandehe samupasthite/gotrajaiś-cāparijñāte kulaṃ sākṣitvam-arhati//Medhātithi (ubi cit.) likewise gives bandhu-jana-samūhaḥ as his first interpretation of kulāni in Nāradas' text.
2. Mayrhofer, A Concise Etymological Sanskrit Dictionary, s.v. The term seems of Dravidian origin and kuṭumbin = householder appears relatively late in the literature of the Brāhmaṇas. Śatapatha-br.2,5,5,6; Rau, op.cit., 39.
3. 3,2,21 [99; tr.229]. It may also mean '(emotionally) attached to the household', that is the widow does not wish to remarry or not remarry outside her husband's kula.

kuṭumba of his brother while the latter is away to acquire learning.[1]

Kuṭumba was something which had to be established unlike the kula which was already in existence, but the continuation of which had to be secured by dāyādas. Thus in the Vinaya Piṭaka we find an instance where a gahapati establishes the kuṭumba of his sister's son to the prejudice of his own son who describes the gifts to the sister's son as actually constituting his "inheritance" (pituno dāyājja).[2]

The term kuṭumbin occurs to describe a family where the householder and his wife have some joint interest in the property: kuṭumbinau dhanasyeśate.[3] In the Arthaśāstra kuṭumbinaḥ appears with the meaning of heads of families of workmen.[4] The well-known Śelārvāḍi inscription associates the term kuṭumbaka (kuḍubika) with a peasant who works his own fields and distinguishes this peasant from his son who had become a gahapati, a "squire" or a rich householder

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1. kuṭumbaṃ bibhṛyad-bhrātur yo vidyām adhigacchataḥ/ [191; Dh.K.1221]. "If a brother maintains the family of another brother who is engaged in acquiring learning..." Jha, HLS, II, 42.
2. III, 66-67: Kuṭumbañ ca saṇṭhapesi dānañ ca paṭṭhapesi. Quot. by Wagle, 242.
3. Āpastamba-dh.sū. 2,11,29,3 [296; Dh.K.1407a]. SBE,II,168.
4. 2,4,24 [39]: karmānta-kṣetra-vaśena kuṭumbinām sīmānaṃ sthāpayet. Tr. 81: "He should fix boundaries for householders in accordance with areas necessary for their workshops."

(Skt.: gṛhapati).[1]

In the Smṛtis the term is not necessarily confined to the nuclear family, because just as the kula might become a clan, the kuṭumba may grow into a kula, a large household which would split up eventually to form a clan.[2] In the chapter on debts the term is made use of and some texts disclose the circle of family members or numbers of generations staying in a kuṭumba. The Nārada-smṛti says: "If a debt has been contracted for the purpose of a kuṭumba, by an unseparated uncle or by an unseparated brother, or by the mother, it shall be paid by all those who inherit the property on the death or on the going abroad of the man who contracted the debt."[3] More clearly a text from the Bṛhaspati-smṛti shows that kuṭumba implies an extended household: "When a debt has been incurred for the benefit of the family, by an uncle, brother, son, wife, slave, pupil or dependant - it should be paid by the head of the family..."[4] For

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1. Burgess, Cave Temples of Western India, 1881, 38; Tr. Kosambi JASB, 30(1956), . See for the meaning of kuṭumbin and kuṭumbaka R.S.Sharma, Śūdras in Ancient India, 233: cultivating householders.
2. The medieval Lekhapaddhati (p.10) distinguishes between udvasa-[sic] kuṭumbikas = cultivators who have come from outside and settled recently and kula-kuṭumbikas = farmers who lived for generations at the same place and who might be the original settlers.
3. Nār. 4,3 [46]: pitṛvyenāvibhaktena bhrātra vā yad-ṛṇaṃ kṛtam/ mātrā/vā yat-kuṭumbārthe dayus-tad-rikthino' khilam//.
4. 11, 121 [118]: pitṛvya bhrātṛ-putra-strī-dāsa-śiṣyānujī-vibhiḥ/yad-gṛhītaṃ kuṭumbārthe tad-grhī dātum-arhati//.

describing the liability of the family members for debts incurred for the purpose of a family, kuṭumba was more apt than kula as we can see from the use of the term kula by Manu and the difficulties of most of the commentators to understand this as referring to the liability of an undivided family for debts.[1]

The attempt to preserve the continued existence of the kuṭumba and to prevent its breaking up, with the result that three generations would be living jointly, is visible in a passage from the Śaṅkha-Likhita-dharmasūtra: "On the father becoming disabled, the eldest brother shall carry on the business of the family (kuṭumba-vyavahāram); or with his permission the next brother who may have knowledge of business. There shall be no partition of property if the father is unwilling ... the eldest brother shall guard the property in the same manner as the father; as the property is the basis of the family (riktha-mūlaṃ hi kuṭumbam); and those whose father is alive are not independent. Similarly while the mother is alive."[2]

The passage dwells on the necessity of preserving the property of the family during the life-time of the father and mother which applies presumably to families which were less wealthy and which were monogamous. Such families

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1. Manu 8, 169; SBE, XXV, 284 and fn.
2. Jha, HLS, II, 23 [Dh.K.1147].

tend to emulate the customs of the large, undivided, patrilineal and patriarchal household, in which especially women are protected by father, husband, and sons according to the classic passage of Manu.[1] Partition during the life-time of the parents was only to take place when property was plentiful so that the material security of the father and the mother was not prejudiced. Further, a mother or wife looking after the affairs of the family as far as they concern the outside world and especially the earning for maintenance of the family,[2] would be an undesirable proposition. We find for instance that a distinction is made in the Law on summons between a woman who is born in a kula (kule jātam) and a woman who is herself a householder (kuṭumbinī). The former is not to be summoned whereas the latter can be summoned personally and is mentioned along with women who are of low status.[3]

The two bases for the existence of a householder are said to be a well-kept house and field: dve vāsahetu kuṭumbinām; mūlaṃ kuṭumbinām.[4] Property is the basis of the

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1. See below, 105f.
2. As in the case of wives of washermen, hunters, herdsmen, and distillers. Cp. Kāty. 569-70.
3. Kāty. 97 and 98; Kane, HDh, III, 287.
4. Nār. 14,42 [172]: gṛha-kṣetre ca dṛṣte dve vāsa-hetū kuṭumbinām/ tasmāt te notkṣiped-rājā taddhi mūlaṃ kuṭumbinām//.

family and a person who has lost dāya or kuṭumba may be suspected ipso facto of being a criminal![1] A householder should not prejudice the basic needs of the family by alienating his whole property: svaṃ kuṭumbāvirodhena deyam ...[2] Except the house, the necessary clothes and food, being the requirements of maintaining the family, the property may be given away.[3]

(4) The Establishment of Patriarchy in Legal Texts.

(a) The Situation in the Pre-legal Era.

There are several instances which indicate that the patriarchal authority of the head of the family was based on weak foundations. We learn from two passages in the Brāhmaṇa literature that sons, apparently without much ado, divided the property of an aged father.[4] The earliest example of sons dividing the possessions of an aged father comes from the Ṛg-veda.[5] In the Atharva-veda we find ritual devices to prevent harsh treatment of parents by their adult sons. A prayer for the new-born son concludes "let him not, increasing, slay his father; let him not harm his

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1. Arthaś. 4,6,2 [137; tr.311].
2. Yājñ.Sm. 2, 175.
3. Kāty. 640: sarva-sva-gṛha-varjaṃ tu kuṭumba-bharaṇādhikam/ ... deyam .../// Bṛhaspati 14,3 [137]: kuṭumba-bhakta-vasanād-deyaṃ yad atiricyate...
4. Jaiminīya-br. 3,156. Aitareya-br. 5,12,2ff. See below,
5. 1,70,10 [i, 462; Dh.K. 1158a].

mother that gave him birth."[1] To this we may add an instance of the Pāli-Canon where a rich Brāhmaṇ is driven out of his home by his sons in conjunction with his daughters-in-law.[2] It can probably be said that the father was on account of his patriarchal power at liberty to divide the property as he desired, but that his power was subject to the possibility that his sons would oust him from his possessions once he grew too old and physically unfit to exercise the authority necessary in a society which was still on the way to a life of regular settlement.[3]

One consequence of this state of affairs was that the father used to retire after dividing his property and became a parivrājaka or would live under the protection of his son or sons.[4] Thus at times a kula is named after the son which indicates that the father has retired from worldly affairs.[5] In the Pāli-Canon it is also considered in no way

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1. 6,110,3 [813]: sa mā vadhīt pitaraṃ vardhamāno mā mātaraṃ pra minījjanitrīṁ// Tr. Whitney, i, 11; see also 6,140, 1;3 [866f.] Zimmer, Altindisches Leben, 327.
2. Saṃyutta Nikāya, I, 176-177.
3. For references to tribal life and feuds, see W. Rau, 18; foodgathering, hunting, and fishing as important supplements to diet, 22; cattle-breeding, 24; evolution of the meaning of the term grāma from 'a horde of migrating cattle-breeders' or 'band of warriors' to 'car-camp' and 'village'. Has the term kula a similar origin? Cp. go-kula.
4. Cp. the famous handing-over ceremony by the father to the son in the Śāṅkāyanāraṇyaka (4,15), quot. by W.Rau, 45.
5. Śatapatha-br. 14,4, 3,32 = Bṛhadāraṇyaka-upaniṣad 1,5,21. Cp. Jāiminīya-br. 2,286; 3,3. Quot. by Rau, 37.

unusual to retire at an advanced age from active day-to-day affairs and to hand over the property, as the instance of a gahapati named Poṭaliya illustrates.[1] The Manu-smṛti contemplates the father becoming an ascetic and living under the protection of his son.[2]

(b) Consolidation in the Dharmaśāstras.

By the time the Dharma- and Gṛhyasūtras came to be composed, major parts of the society in the Gangetic valley were inhabited in regular settlements. We hear of rich householders - gahapatis - and the society was supported by regular agriculture based on plough cultivation. As a consequence of the more settled condition a father might not think of dividing the property and would postpone a partition until after his death. The proposition that the father should withdraw from worldly pursuits and enter the vānaprastha stage became rather an ideal and not a practical solution. The continuation of a state of affairs which would allow sons to divide the property of the father against his wishes was, therefore, strongly condemned. A series of texts make it clear that the property should be divided only in accordance with the will of the father or after his death.[3] Other

1. Majjhima Nikāya II, 339. The case of the Buddha himself is an instance in point. He is asked by his son Rahula for his inheritance (dāyajja = dāya). Vinaya Piṭaka I, 82. Wagle, 82 f.
2. Manu 6, 94-95; tr. SBE, XXV, 215.
3. Baudhāyana-dh. 2,3,8; Manu 9,104; Gautama-dh.sū. 28,1; Śaṅkha-Likhita-dh.sū. as cit. e.g. in the Kṛtya-kal.649, Dh.K.1148b.

rules provide for the exclusion of sons who initiate a partition against the father's will from the śrāddha-ceremonies which practically amounted to social ostracism, a serious proposition considering that the loss of one's kin involved severe social and economical consequences.[1] The son is said to have no property and is asvatantra during the lifetime of the father, a proposition which finds its strongest expression in the dicta of Manu and Nārada: "A wife, a son, and a slave, these three are declared to have no property; the wealth which they earn is (acquired) for him to whom they belong."[2] "Non-independent are women (wives), sons, and slaves together with the household. Independent there is the householder, to whomsoever it has come by descent."[3] "Three persons are svatantra in this world: the king, and also the spiritual teacher; and in every caste, caste by caste, the master of the house in his own house."[4]

The concept of the head of the household as a miniscule king transpires in this dicta and has influenced much of the early law of the family, and the rule of primogeniture probably derives from this atmosphere.[5] Manu's and

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1. Manu 3, 159; Gaut.dh.sū. 15,18.
2. Manu 8, 416; SBE, XXV, 326.
3. Nārada 4, 31 [57]; tr. Derrett, ZVR, 64 (1962) at p.97.
4. Nār. 4,32[57]: trayaḥ svatantrā ~~bolredomin~~ Leke'asmin rājācāryas tathaiva ca/prativarṇaṅ ca sarveṣāṁ varṇānāṁ sve gṛhī gṛhe// Tr. Derrett, ubi cit., 96.
5. See Vyāsa cited in the Vibhāga-sāra 9, 1,2; Jha, HLS, II, 83: The rule of primogeniture is found e.g. in Manu (9,105).

Nārada's dicta are explicable in the atmosphere of the large, wealthy, and possibly polygamous patriarchal household, where the authority of the father had to be firmly established, but was also more easily attainable, because of his economic independence. His dependence on sons was essentially confined to having worthy heirs. Yet this approach of the law, namely, that the sons and women 'belong' to the patriarch and ipso facto their property is really speaking his property is a recurring feature in legal writings, even after it was admitted that sons could acquire property of their own. The patriarchal household which may dissolve at the wish of the father or after his death was probably customary among the descendants of the Aryan tribes whose customs other communities tended to emulate. The seclusion of women which began amongst Kṣatriyas according to Śatapatha-brāhmaṇa[1] the non-participation of women in the property of the agnates, the institution of strīdhana as the separate property of the woman is in line with this. It must be stressed, however, that this patrilineal and patriarchal system was modified to some extent by Smṛti-authors who were aware of changing social conditions and customs of different origin.

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1. Rau, op.cit., 29: Śat.br. 10,5,2,10.

(5) Nuclear Family and the Desirability of Extended Families. Community of Goods between Husband and Wife.

The patrilineal, vertically extended family occurs frequently in the pre-legal literature and was a desideratum for various reasons, especially because a son and the continuation of one's line was a material and spiritual necessity.[1] Nuclear families where sons would leave the family at marriage would especially occur where there was little or no property to inherit and where sons would have to seek for a living and could readily build their own hut or home. Whereas for poor parents sons were needed for protection in old age, the wealthy family would require at least one son who would look after the estate eventually and inherit it, as otherwise the property might revert to one's kin, to the tribe or to the king. The story of Sudinna in the Vinaya Piṭaka[2] illustrates the danger for the property of a rich couple in case they lose their only son. Sudinna wanted to join the Buddhist Saṅgha and his parents try to dissuade him as otherwise their property would revert to the Licchavis. The possibility of adoption seemed not to have been

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1. See below, 71 ff., 73ff.
2. III, 16ff.; see above,

contemplated then and there.[1]

If there were many sons, some of them could leave the family at marriage taking a share of the property in advance. Thus the fact that the eldest son may leave the family after receiving a share of the property is noticed in the Taittirīya-saṃhitā: "They settle the eldest son with wealth."[2] The setting up of a housefire has to take place at the marriage or at the time of the partition of dāya according to the Pāraskara-gṛhyasūtra and the Gautama-dharmasūtra, which implies that for the establishment of their own homes sons must have been provided with property

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1. The Dharmaśāstras place restrictions on the right of the king to inherit, at least in the case of Brāhmaṇas. Gaut.dh.sū. Manu 9, 188-89. Bṛh.Sm. 26,119[216]: ye'putrāḥ kṣatra-viṭ-cchudrāḥ patnī-bhrātṛ-vivarjitāḥ/ teṣāṁ dhano-haro rājā sarvasyādhipatir-hi saḥ//- "Should a Kṣatriya, Vaiśya or Śūdra die without son, wife or brother, their property shall be taken by the king as he is the lord of all." Cp. Arthaś. 3,5,28f. [108; tr.243]; Kāty. 931 etc. In the early period a brother was not necessarily 'separate in status' so that the question whether Bṛhaspati's text refers to a joint brother or a divided brother would not arise.
2. 2,5,27: ... jeṣṭhaṃ putraṃ dhanena nirvasāyayanti. Monier Williams nir-ava-so, caus. -sāyayati = to establish, to settle, furnish; cp. Arthaś. 3,5,21[104]: sanniviṣṭa-samam-asanniviṣṭebhyo naiveśanikaṃ dadyuḥ, kanyābhyaśca prādānikam - "To (brothers) who are not established (in life) they shall give some amount for their marriage, equal to that of those already settled, and to daughters an amount for bestowal in marriage." [242]. This is irrespective of their regular share according to Kangle. J.J.Meyer translates naiveśanikam as 'Haushaltungsgründungssumme', 256.

receiving some advancement.[1]

Whereas normally in the śāstric system the patrilineal family is dominant and at least one of the sons remains in the paternal household, we also have to take into account the widespread existence of the nuclear family in customary law according to which normally all the sons and daughters left at their marriage to establish separate households.[2] In this context the institution of a community of goods between the spouses created by marriage would follow which plays a marginal rôle in the Dharmaśāstra and is represented by the (probably spurious) Smṛti author Datta. The passage, as cited in the Smṛti-tattva, reads: dampatyor madhyagaṃ

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1. Pāraskara-gṛ.sū. 2,1[1]: āvasathyādhanaṃ dārākale//1// dāyādya-kāle ekeṣāṃ//2// - Tr. SBE, XXIX, 271. Cp. Gaut. dh.sū. SBE, II, 199. N.C. Sen-Gupta, Evolution of Anc. Ind. Law, 207, draws attention to the housebuilding ceremony in the Aśvalāyana-gṛ.sū. (2,7-9) which is interposed between the rituals of marriage and the daily and periodical rituals of a gṛhastha (householder). See also, ibid., 38, baliharaṇa ceremony in Baudhāyana.gṛ.sū. (2,8,1-40). Sen-Gupta suggests that the ceremony, which involves offerings in one's own house and then in the house of the elder brother, indicates that descendants of a common ancestor normally lived grouped together in adjacent but different houses.
2. See J.D.M.Derrett, Contr. to Ind. Soc., 6(1962) 17ff. (at 22f.) with reference to Tesavalamai, A study in the literature of the Sangam Age indicates the prevalence of the nuclear conjugal family. See R.Shanmugam, "The Kinship Terms in Caṅkam Literature", Summaries of Papers (26th Int. Congr. of Orientalists, New Delhi, 1964, 226f.).

dhanaṃ - "Property is joint, or common between spouses."[1] Amongst the śāstric authors of whose works we have complete versions, Āpastamba comes close to this concept when he declares that no division of property takes place between husband and wife, that they are joint as to religious ceremonies and spiritual merits and with respect to the acquisition of property. The wife may, therefore, spend on necessary occasions from the common property and she would thereby not commit theft.[2] The same author states that both husband and wife have power over the property.[3] The influence of this institution in the Dharmaśāstra did not amount to the recognition of a right of the widow to succeed to the common estate by survivorship in the presence of sons though

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1. The text is cited anonymously in the Smṛti-tattva, see Jha, HLS, ii,249, and is attributed to Datta by Jagannātha, Vivāda-bhaṅgārṇava, Colebrooke's tr., ii, 541. The significance of this text in customary law and the śāstra was first explained by J.D.M. Derrett in: ZVR,58 (1965) 219ff.; Univ. of Ceylon Rev., 14(1956) 105ff. (at 119, fn.86); BSOAS, 18(1956) 490; see especially discussion at ZVR, 64(1962) 62ff.

2. Āp.-dh.sū.2,14,16-20[; tr.SBE,II,138]: jāya-patyor na vibhāge vidyate//16// pāṇigrahaṇādhhi sahatvaṃ karmasu //17// tathā puṇya-phaleṣu//18// dravya-parigraheṣu ca// 19// na hi bhartur vipravāse naimittike dāne steyam-upadiśanti//20// Joint authority of husband and wife existed in respect to giving a son into adoption. See Manu 9, 168. In Milinda', Questions we find an instance of a wife consenting to the sale of the son. I.B.Horner's tr., 95f. For further illustrations, see

3. See above,31.

the latter may have separated from the father.[1]

The tribal past of the descendants of the Aryan would make the wife merely an object to procure male issue, a bhastrā, i.e. a leather-bag or basket for holding children, as she is called at one place in the Arthaśāstra.[2] But parallel to this notion we find the concept of the identity of husband and wife in very early texts. In the Śatapatha-brāhmaṇa we read: "The wife is half of the man."[3] The Vājasaneya-brāhmaṇa elaborates this concept: "A man is only half of his self. Therefore, when he does not take a wife he is not fully born, for he is incomplete so long. Then when alone he takes a wife, he is fully born, for he is incomplete so long and he becomes complete. Accordingly Brāhmaṇs versed in the Veda declare this: 'The person known as husband is verily known as wife'."[4] This concept finds its expression in the unity of husband and wife in spiritual-religious matters. The husband is dependent on the wife's co-operation at the domestic sacrifices.[5] The identity of

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1. On the rights of the woman at divorce and the rights of the widow at customary law, see references to Tesavalamai in Contr. to Ind. Soc., 4(1962) at 26f.
2. 3,7,1-2[103]. Cp. garbha, Ṛg-veda 3,31,21. The notion of the wife as kṣetra - field - comes with agriculture and could be of later origin.
3. 2,5,1,10 : ardho ha eṣa ātmāno yaj-jāya. Kane, HDh, III, 428.
4. Cit. by Kullūka Bhaṭṭa on Manu-smṛti 9,45[372]. He adds dampatyor aikyam = there is identity of husband and wife. Tr. Śaṅkharāma Śāstrī, Fictions in Hindu Law, 206f.
5. Taittirīya-br. 3,7,5; Kane, HDh, II, i,556f.

husband and wife may possibly have contributed to the establishment of monogamy as a preferable śāstric principle and may well have furthered the claims of the sonless widow to the estate of her husband.[1] The influence of the institution of community of goods may have protected the rights of the mother/widow against a partition of the paternal property by the sons before her death, as e.g. in the Manu-smṛti, though we notice that this author makes a distinction between the father's property and the mother's property (strīdhana) which is against the notion of community of goods, and is the normal distinction in the Dharmaśāstras.[2]

(6) Fraternal Polyandry. The Fraternal Joint Family

(a) Traces of Polyandry in Legal Literature.

In the large patriarchal household sons may stay together after the death of the father. Jointness, based on kinship ties, was indicated by the necessity to ward off enemies, or by the advantages of carrying out agriculture or even business jointly. It may be necessitated by mere pressure of an inhospitable environment where it even may lead to polyandry.[3] The early Sanskrit texts know little

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1. See below, 120ff.
2. Manu 9, 104 and 9,192. Cp. Arthaśāstra 3, 5,1-2, where 'sthita-pitṛ-mātṛkaḥ' is probably a later addition. See Kangle, tr.240,fn.
3. As among the Khasa; see K.M. Kapadia, Marriage and Family in India, 71. L.D. Joshi, The Khasa Family Law.

of polyandry, though according to the Gopatha Brāhmaṇa a woman could not have several husbands which may be a reproach to such custom:... na haikasyā bahavaḥ patayaḥ.[1] The Bāhlīka-tribe which is referred to in the Śatapatha-brāhmaṇa and in the Mahābhārata is considered to have been polyandrous.[2] The Arthaśāstra and the Dharmaśāstras turn against the notion that marital rights belong to anybody else besides the individual husband, though the Āpastamba-dharma-sūtra is aware that a girl was in the possession of the whole kula, because she was the consideration of the property expended in purchasing her.[3] The Arthaśāstra carefully regulates remarriage in case the husband is absent over a long period, has become a monk, or is dead, by providing an order of preference according to which the woman is to marry a member of the family, if she so chooses.[4] The Manu-smṛti recorded but deprecated this custom of remarriage within the kula and echoes the order of preference only in

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1. 2,3,20[206,9]; quot. by W.Rau, op.cit., 42. The story of Draupadi and the five Pāṇḍavas has been refashioned to suit the notions and the sentiments in the śāstras.
2. Sen-Gupta, Evol. of Anc. Ind. Law, 29; Derrett 14(1956) Univ. of Ceylon Rev. 115.
3. 2,27,2-7 [289f.]: Kulāya hi strī pradīyate ityupadiśanti //3// Bṛhaspati notices the custom of marrying a brother's widow "in the north" and declares it deśa-jāti-dharma which is protected, though it is essentially undharmic and to be ranked together with the pratiloma-marriage. Bṛh.Sm.1,126f.; 130[217]: sahajātaḥ pragṛhṇanti bhrātṛ-bhāryām-abhartṛkām.
4. 3,4,37-40[103; tr.240].

connection with the custom of niyoga, according to which a person could be authorised to have intercourse with the wife in order to beget a son for the husband.[1]

(b) The Fraternal Joint Family:
Its conception as a Temporary Institution in the Dharmaśāstras.

Rivalry between collaterals and their descendants is early evidenced in the connotations of the terms for brother (bhrātṛ) and brother's son (bhrātṛvya) which occasionally assumes the meaning of 'rival' or 'enemy'.[2] Brothers may co-operate in their relations with the outside world, but disputes inter se about property are not precluded. The continuation of the fraternal joint family becomes difficult when increased opportunities to acquire property for the individual member are available who generally prefers to favour his own immediate descendants rather than to enjoy property jointly with his agnatic collaterals. The story told in the Pāli-Canon of a seṭṭhi

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1. Manu 9,59; in 9,60-63 the custom of niyoga is regulated and 9, 64-67 rejected as being against dharma. For traces of polyandry see 9, 162; 182.
2. Macdonell and Keith, Vedic Index, s.v. Bhrātṛ: Ath.-v. 3,30,2; Śat.-br. 4,1,5,3; bhrātṛvya: Ath.-v.2,18,1; 8,10,33; 10,9,1; Tai.-Saṃ.3,5,9,2; Kath.-Saṃ. 10,7; Vāj.Saṃ. 1,17; Ait. br.3,7, etc.; Pañc.-br. 12,13,2. Cp. W.Rau, op.cit., 97 f.

who dies without heir because in his previous birth he killed his brother's only son for the sake of property, shows the attitudes with which the Dharmaśāstras had to deal.[1] Before the Dharmaśāstras codified the ideal behaviour in such contexts we hear already in the period of the Brāhmaṇas of attempts to strengthen the position of the eldest brother as a person of respect with whom the younger brother should not drink together, who takes a share in the inheritance before the younger brother and marries first.[2] The Dharmaśāstras inculcate the respect for the eldest brother with prescription of penance: "In the case of a younger brother who takes a wife or his portion of the inheritance before his elder brother, penances ordained for crimes causing impurity, heavier for each succeeding case, must be performed."[3] The Manu-smṛti weakens the importance of sons beyond the first-born thus strengthening his position against his brothers and proposes that the father is to be succeeded by the eldest son who inherits the whole estate.[4]

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1. Samyutta Nikāya 1,52; see also the story of Nābhānediṣṭha in Ait.-br. 5,14,2ff. who was disinherited by his brothers.
2. Kath.-saṃ. 30,3(2,183,21) and Tait.-saṃ. 7,2,7,1; Kath.-saṃ. 36,7,(3,74,16); Māit.-saṃ. 2,4,2,(2,39,18ff.) and Kath.-saṃ.12,12(1774,17ff.) Rau, op.cit., 40,46.
3. Āpastamba-dharmasūtra 2,5,12,22[227]; SBE,II,128f. See also Manu 3, 154 and 3,172; SBE, XXV, 103f., 108f.
4. Manu 9, 105-110. This elevation of the eldest brother is perhaps intended to ensure discipline between the others, who have this in common, that they all respect the eldest.

On the other hand the Arthaśāstra had noticed a rule among certain communities according to which sons may live under a brother who displays special skills in his profession,[1] and the Dharmaśāstras realise that economical necessity and the prosperity of the family would occasionally not only demand joint living, but also that the most capable of the brothers should be at the helm of the family affairs: "The eldest brother, or the youngest brother, shall support all (the brothers) like a father, if they wish it, in accordance with capacity; the wellbeing of the family is dependent upon the capacity (of its head)."[2] In the Śaṅkha-Likhita-Dharma-sūtra the economical aspect of jointness is referred to when it is said that the brothers "may, if they wish, live together; united they would clearly bring about prosperity".[3]

But jointness of brothers (however convenient for farming etc.) becomes a matter of mutual agreement, based on economic considerations as indicated by Nārada and Śaṅkha-Likhita. The Smṛtis take account of the desire to establish

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1. 3,6,14-16[105; tr.245]: sūta-māgadha-vrātya-rathakāraṇām-aiśvaryato vibhāgaḥ (14) śeṣṭās tam-upajīveyuḥ/15/ anīśvarāḥ/16/
2. bibhṛyād-vecchataḥ sarvāñ-jeṣṭho bhrātā yathā pitā/ bhrātā śaktaḥ kaniṣṭho vā śaktyapekṣāḥ kule sthitiḥ [v.l.śriyaḥ]// Nār.Sm.13,5[190]; In the Coorg okka it was said that "the wisest is the eldest". Srinivas, Religion and Society among the Coorgs..., 51.
3. kāmaṃ vaseyur eka-matāḥ saṃhatā vṛddhim āpadyeran [Dh.K. 1195].

separate households and to enjoy property separately from the agnatic collaterals and the ideal behaviour - the older rule of primogeniture receding - is to establish separate households, to apply individually the property to purposes which the śāstra prescribes and to gain spiritual merit thereby; after supporting the preferential position of the eldest son, the Manu-smṛti expresses the advantage of separating and dividing the property: "Either let them thus live together, or apart, if (each) desires (to gain) spiritual merit; for (by their living) separate (their) merit increases, hence separation is meritorious."[1] Thus jointness of property between brothers is treated rather as a transitory condition and the rules in the Dharmaśāstras concentrate on the method of partition and connected issues (see below). Before partition the younger brothers had a proprietary claim to the property but were not fully competent to deal with the family property.[2] The only possibility according

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1. Manu 9,111; cp. Gaut.-dh.sū. 28,4; Bṛhaspati 26,5[196]: eka-pākena vasatāṁ pitṛ-deva-dvijārcanam/ ekaṃ bhaved vibhakṭānāṁ tad eva syād gṛhe gṛhe// Cp. Saṅgraha-kāra: kriyate svaṃ vibhāgena putrāṇāṁ paitṛkaṃ dhanaṃ/ svatve sati pravartate tasmād-dharmyāḥ pṛthak kriyāḥ// "By partition, the sons make their paternal property their own; it is only when their ownership has come about that actions proceed; therefore separation is conducive to spiritual merit." Jha, HLS, II,27 = Dh.K. 1142b.
2. J.D.M. Derrett, Contr. to Ind. Soc. 6(1962) at 38f. Arthaś. 3,5,15[104;tr.242]; Bṛh. 14,2[137]: sāmanyam... na deyam. Dakṣa, cit. in Kṛtya-kal. Dāna-kāṇḍa, 17,Dh.K. 807a; Nār. 5,4; Derrett, BSOAS 20(1957) 203ff.

~~for~~ to the Smṛtis to facilitate the enjoyment of property without danger of encroachment by one's collaterals was to establish the rules of partition on firm foundation and justify the demand of a younger brother by an appeal to religious reasons.

II. The Ancestral Cult and Sapiṇḍaship. The Origin of Sapiṇḍaship and Its Function in the Dharmaśāstras.

(1) The Evolution of Ancestor Worship according to Pre-legal Literature.

One of the basic and original motives for ancestor-worship in India, as indeed anywhere else where it existed or exists, seems to be derived from the belief that the "deceased" ancestors cannot be really dead, but still participate in the family affairs. The goodwill of the manes has to be secured by the living, and they have to be propitiated and "maintained" by offerings of food etc.[1] Eventually

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1. As an illustration from the mass of literature on the subject a reference to Srinivas, Society and Religion of the Coorgs..., may suffice. The ancestors take active interest in the affairs of the okka (¶51,229), and food is offered to the dead ancestors of the okka at the periodical ancestor propitiation (113f.) which is called karaṇava bharani, lit. "pleasing the ancestor". There are

continued:

these beliefs led to ceremonies performed in memory and honour of the deceased with symbolical offerings with which the feeding of Brāhmaṇas became associated in the Gṛhyasūtras.[1] Such offerings take place according to the Vedic ritual of piṇḍa-pitṛ-yajña and the mahā-pitṛ-yajña which are described in the Śrautasūtras. According to the Śrautasūtras the feeding of Brāhmaṇas has no place in these rituals, whereas

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two modes of propitiation, namely the one involving non-vegetarian food and liquors and the "sanskritic" mode which consists in the offer of piṇḍa, under the guidance of a priest (165f.). This corresponds roughly to a parallel development in the śāstric ritual. The ancestors assume the form of crows (105). Cp. Baudh.-dh.sū. 2,8,14; Manu 3,261; Kane, HDh, IV, 335. The ancestor worship among the Coorgs does not seem to have recognized the worship of any particular ancestor beyond the father, and the impartibility of ancestral land, the non-recognition of individual rights, particularly land (52 f.) is in accord with this. In the Dharmaśāstras the differentiation of ancestors is utilized to establish the rights of a particular person and his descendants, though eventually the particular value of ancestral immoveables and other enduring sources was acknowledged for purposes of inheritance and limitation on the power of alienation of the individual. See below, 243ff.

1. See D.R. Shastri, Origin and Development of the Ritual of Ancestor Worship in India, ch. V. 'Worship of the Pitrs', 102.

for the followers of the Gṛhyasūtras the feeding of Brāhmaṇas is part of the piṇḍa-pitṛ-yajña.[1] In the Gṛhyasūtras, the pākayajñas or offerings in the household fire are dealt with which include the aṣṭakā, pārvaṇa and the funeral offerings like the ekoddiṣṭa and sapiṇḍīkaraṇa.[2]

Rather than discussing the mass of ritual details in the Vedic - and Dharmaśāstra-literature we may ask who the recipients of the offerings were, as this may throw light on the composition of the families. Literary evidence from the Ṛg-veda onwards indicates a meandering development from worship of communal manes to worship of specific ancestors of a family. In the Ṛg-veda a period which is still marked by the prevalence of tribal life and different concepts of property-holding, the ancestral spirits are vaguely referred to and occur as the early or ancient ancestors of the human race that were supposed to inhabit a separate

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1. D.R. Shastri, op.cit., 105. Kane, HDh, II, 1085ff.: Pitṛ-piṇḍa-yajña. Śat.br. 2,3,2,; Tait.-br. 1,3,10; 2,6,16; Aśvalāyana-śrautasūtra 2,6-7; Katyāyana-śrautasūtra 4,1, 1-30 etc. Kane, ubi cit., 1101-1103: mahā-pitṛ-yajña.
2. Kane, HDh, IV, 426 ff.: pārvaṇa-śrāddha. Tait.saṃ.1,8,5, 1-2. Tait.-br. 1,3,10,1-10. Sat.-br.2,4,2; Aśv-gṛhyasūtra 4,7-8 etc. Kane, ubi cit., 516ff.: ekoddiṣṭa. The pārvaṇa-śrāddha is intended for three paternal ancestors, the ekoddiṣṭa is meant only for a deceased person. Kane, ubi cit., 520: sapiṇḍākaraṇa, reception of a deceased person into the community of pitṛs to whom piṇḍas are offered.

world by themselves.[1] In the Atharva-veda the ancestors are similarly referred to as 'fathers': "O Agni to eat oblations, bring thou the Fathers one and all, the buried and the cast away, those burnt with fires and those exposed."[2]

These passages have been interpreted to refer to manes of the community,[3] an observation with which we would like to concur considering that tribal conditions influenced the family life, land tending rather to be the territory of a tribe. Fixed settlements and land owned by families or individuals seem to be the prerequisite condition for a developed worship of specific ancestors. But from the Atharva-veda onwards we can discern a shift from the reference to pitṛs in general without reference to their generations towards a group of specific ancestors, with whom ancestors of the same generation are associated and finally to three specific male ascendants alone. In Ath.-veda 18, 4,35 we read: "In Vaiśvānara I offer this oblation a thousandfold, hundred streamed fountain; it supports our

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1. Kane, HDh, IV, 304f. R.S.Sharma, Aspects of Political Ideas and Institutions in Ancient India, 63 ff., 71-75, points to the communal (tribal) character of sacrifices and prayers in the vidatha of the Ṛg-veda which similarly tends to speak against developed ancestor cults. At p.75: "... the domestic gṛhya-rites are of strictly private nature, but of that there is hardly any trace in the earliest collection of the hymns."
2. Ath.-v. 18,2,34. [1688]: ye nikhātā ye paroptā ye dagdhā ye coddhitāḥ/ sarvāstānnagna ā vaha pitṛn haviṣe attave//
3. Kapadia, Hindu Kinship, 10.

father, grandfathers, great-grandfathers, it supports swelling".[1] In the funeral hymn of the Atharva-veda the invocation is directed: "To thee great-grandfather and those after you be this cry of hail. To thee grandfather and those after you be this cry of hail. To thee father be this cry of hail. Svadhā to Fathers on earth, in the atmosphere, in the sky".[2] The phrase 'and those after you' (ye ca tvām anu) which occurs in the invocation of the Bhāradvāja-gṛhyasūtra (2,12,14) as anugaiḥ saha = 'with those who follow thee' is explained by Kapadia as referring to an ancestor being invoked with his immediate descendants, i.e. with great-grandfather with grandfather and grandpaternal uncle. The fact that the phrase is also added to the invocation addressed to the father of the sacrificer according to the Bharadvāja-gṛhyasūtra is attributed by Kapadia to the fact that offerings are not only made to three immediate ascendants, but to all (deceased) persons related to the offerer within four generations in ascent.[3]

In the Śatapatha-brāhmaṇa, Taittirīya-saṃhitā and finally in the Gṛhyasūtras and Śrautasūtras the offerings

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1. Vaiśvanāre haviridaṃ juhomi sāhasraṃ śatadhāramutsam/ sa bibharti pitaraṃ pitāmahān prapitā-mahān bibharti pinvamānaḥ// [1760]
2. Ath.-v. 18,4,75-80 [1880f.]
   Cp. 18,2,49 [1694]; 18,3,46[1724]; 18,3,59 [1733].
3. Kapadia, op.cit., 12f.

to three paternal ancestors primarily is described in detail.[1]

(2) The Meaning of Piṇḍa and Sapiṇḍaship.

The term piṇḍa appears in the Ṛgveda with the meaning 'body of the sacrificial animal'.[2] But in the Taittirīya-saṃhitā and in the Śatapatha-brāhmaṇa the term appears with the sense 'ball of rice' which is offered to agnatic ancestors.[3] The term is derived from piṇḍ = 'to roll into a lump or ball, put together, join, unite' etc.[4] and the basic meaning seems to indicate a conglomeration or mass made up of different components.[5] In the context of the śrāddha-ceremonies it connotes a 'ball' constituted of various kinds of food; but the meaning 'body'[6] also occurs and is met also in modern Indian languages.[7]

The giving of piṇḍas to the agnatic ancestors implies the belief in their participation in the mess community of the living agnatic family members who are the givers or potential givers of piṇḍas. The living and the dead are thus

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1. See e.g. Śat.-br. 2,4,2,1-24 [201-205; tr. SBE, XII,361-9]; but see Śat.-br. 12,8,1,7 1273; tr. SBE, XLIV, 2349: Śrautamaṇi sacrifice based on Vājasaneya-saṃ. 1936: "To the ... Fathers etc."; Āśvalāyana-gṛhyasutra 4,7-8. etc.
2. 1,162,19 [i,968].
3. Tait.-saṃ. 2,3,8,2. Śat.-br. 2,4,2,24; also Nirukta III, 4 and 5.
4. Monier Williams, Sanskrit-English Dictionary.
5. Derrett, ZVR 64 (1962) 15 at 57.
6. Raghuvaṃśa II, 57,59.
7. Punjabi, Marāṭhi.

called sapiṇḍas, i.e. agnates within a pattern of four generations of living sapiṇḍas and three generations of dead sapiṇḍas (participating at śrāddhas in their descendant's property).[1] Jointness in food and giving piṇḍas in the ancestral cult were intimately connected. It is clear that the members of the agnatic kula or patrilineal joint family must have considered themselves as forming a unit in their relations, with the outside world and were so viewed by outsiders as a unit. They felt themselves and must have appeared to outsiders as of 'one blood' and 'body'.

It seems equally clear that the ancestor cult could originally only be maintained by agnatic descendants, in other words the ancestors would not benefit from offerings by persons who were not agnates.[2] This may be one of the reasons why the widow was excluded originally from inheriting. She was born in a different family and retained, at least in customarily law, residual rights in the family of her birth. She could offer piṇḍa to her deceased husband but not to her husband's agnatic ancestors. The 'appointed' daughter (putrikā), and especially such a daughter's son (putrikā-putra) could be a preferable heir possibly because they were born in the kula and remained members of the kula. The

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1. Derrett, ubi cit.

2. The impurity of piṇḍa (piṇḍa-doṣa), that is, the defects that preclude its acceptance are referred to by R.Williams, Jaina Yoga, 160.

daughter's son's duty to offer piṇḍa was a corollary.

Another aspect in which sapiṇḍaship plays a rôle is marriage. The Dharmasūtras and Smṛtis insist on extensive prohibited degrees of exogamy. A person is not allowed to marry a relative within five degrees on the mother's side nor a member of the same gotra or a relative within seven degrees on the father's side.[1] Āpastamba deprecates intercourse with the uterine relations (mothers and sisters) of one's parents and their children.[2] The extension of the term sapiṇḍa to relations by marriage was gradual. In early texts the term sapiṇḍa is used for agnates but not for relations by marriage.[3] Manu, however, uses the term sapiṇḍa for relations on the mother's side in the context of marriage.[4]

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1. Manu 3,5; 3,172-2; Āp.-dh.sū. 11,15-16; Gaut.-dh.sū.4,2-5; Vās.-dh.sū. 8,1-2; Baudh.-dh.sū. 2,1,32-8; Yājñ. 1,53; Viṣṇu 24,9-10.
2. 1,7,21,8. Kane, HDh, ii,pt.1, 458.
3. Cp. Ap.-dh.sū. 2,4,15-16 [220] (on marriage): sagotrāya duhitaraṃ prayacchet/ mātuśca yoni-sambandhebhyaḥ/- Āp. 2,6,16,2// [244] (on impurity). But see Āp. 2,6,14,2 [234] (inheritance): putrābhāve yaḥ pratyāsannaḥ sapiṇḍaḥ// SBE, II, 126. Gaut. mentions mātṛ-sapiṇḍas in connection with funeral offerings (15,13 [252; SBE, II,252] but cognates are not heirs according to 28,21 [442; SBE, II 302]; the wife's right to inherit is introduced subject to niyoga (Gaut. 28,2 [442]: piṇḍa-gotra-arṣi-sambandhā riktham bhajeran/ strī cānapatyasya/ bījaṃ vā lipseta/ Baudh. uses the term only for agnates (see below, Vāsiṣṭha only in the context of impurity (4,10-19) and for agnates on inheritance (17.81). See also Arthaś. 3,4,40 and 3,6,22 where sapiṇḍa is clearly a near agnate.
4. 3,5,

Repeated marriage bonds especially with the mother's family would create an attitude to consider such relatives as part of the community in the dealings with outside world, especially in the case of cross-cousin marriages where the strict rules on exogamy were widely disregarded from ancient times in spite of śāstric disapproval.[1] Here the connections with family by marriage were so close that the idea of having blood in common assumed importance and the circle of relatives including relatives by marriage, forming 'one body', would be expressed by the term sapiṇḍa.[2]

(3) Sapiṇḍaship and Inheritance.

In the Manu-smṛti the giving of piṇḍa to three lineal male ancestors is stressed (9,186) and the passage is set in juxtaposition to the right to inherit: "Whoever is nearest from among the sapiṇḍas, to him the estate shall belong".[3]

The ceremony of giving piṇḍa or water to three immediate male ancestors, was, it may be suggested, a useful

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1. Baudh, 1,1,1-3 [6ff.] notices the 'southern' custom of marrying one's maternal uncle's or paternal aunt's daughter and deprecates it as against the tradition of the śiṣtas. See also Gaut. 11,20. Āp.-dh.sū. 1,7,21,8. Bṛhaspati 1,128 [21] counts it amongst deśa-jāti-dharma. Kane, HDh, II, pt.i, 458ff. Id. , Hindu Law and Custom, 83-5.
2. See Vijñāneśvara, Mit. I, 53. Below, 257f
3. Kane's tr., HDh, III, 733 of Manu 9, 187: anantaraḥ sapiṇḍād yas tasya tasya dhanaṃ bhavet/ See Kane, ubi.cit., fn. 1418 for amendment of Bühler's tr., SBE, XXV, 366f.

instrument for delimiting the property rights of members of a kula. A relative who 'maintains' or whose duty it is to 'maintain' different ancestors than those maintained out of the property of a household ought not to have a claim on the property. Thus the eldest living male ascendant NN. of the kula would 'maintain' or worship his father, grandfather, and great-grandfather. A grandson's grandson of the great-grandfather would be much too distant a relation and is not offering pinḍa to any of the ancestors to whom N.N. is offering. On the other hand N.N. would be 'dependent' after his death on his descendants for receiving offerings. Three generations of descendants may not have been the normal number of generations living during the lifetime of N.N., though it was highly desirable for a person "to see the great-grandson's face" which ensured the continuation of one's line and ensured one's maintenance after death. At the same time N.N. would see that property would be left to his male descendants, and though their duty to offer was pre-existing and independent of the presence of property derived from the father, the social position of the family and its continuation was secured by property. The ancient fear of the extinction of one's line can certainly be traced to some extent to the apprehension that there may be nobody to secure the participation in the family feeding after one's death. Thus three paternal ascendants are 'living' on the house-

holder, whereas he expects to 'live' on three generations of male descendants who may be alive during his lifetime. The deceased ancestor receiving piṇḍa and those entitled or eventually entitled to offer formed a mess community and were called sapiṇḍas. The offering of piṇḍa was a duty as well as a right, which as a corollary gave a claim upon the property of the deceased ancestors, and the authors of the Dharmaśāstras associate inheritance with the offering of piṇḍas.[1]

It was against this background that in the Baudhāyana-dh.sū. the basic agnatic system of inheritance was formulated according to which not only the rights of a narrower body of claimants was carved out against the wider circle of agnates, but also the claims of the king were postponed: "The great-grandfather, the grandfather, the father, oneself, the uterine brothers, the son by a wife of the same caste, the grandson and the great-grandson, these undivided dāyādas, they call sapiṇḍas; the divided dāyādas they call sakulyas. When there is no offspring of the deceased, his property goes to the aforesaid (sapiṇḍas); in the absence of sapiṇḍas, the sakulyas, the teacher, the pupil or the priest shall inherit;

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1. Āpastamba-dh.sū, 2,6,14,2; Vasiṣṭha-dh.sū. 4,16-18; Gaut.dh.sū. 15,13; 28,21; Viṣṇu-dh.sū. 15,40ff.

and on the failure of these, the king".[1]

III. The Origin of the Terms Dāya and Riktha.

In search of terms which throw light on the concept of property within a family in the Ṛg-vedic period we find that two terms come into question which also have been employed in later legal texts: riktha and dāya. The word riktha occurs in a passage in which it is said: na jāmaye tānvo rikthaṃāraikcakāra garbhaṃ saniturnidhānam.[2] Kane translates: "The son of the body does not give to his sister the ancestral wealth, but makes her the receptacle for the son of her husband". Riktha, derived from ric = 'to leave', literally means 'what is left', i.e. the wealth over which the father's power had ceased due to his death and over which the son's or sons' power has arisen.[3] The term riktha, however, does

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1. Baudh.-dh.sū. 1,5,11, 9-14 [56; Dh.K. 1467b f.]; Vi.-ra, 602; Kṛtya-kal. 751. Jha. HLS, II, 510:
prapitāmahaḥ pitāmahaḥ pitā svayaṃ sodaryā bhrātaraḥ savarṇāyāḥ putraḥ pautraḥ prapautra etān-avibhakta-dāyādān sapiṇḍān ācakṣate/ vibhakta-dāyādān sakulyānaca kṣate/ asat-svaṅgayeṣu tad-gāmī hyartho bhavati/ sapiṇḍā-bhāve sakulyas tad-abhāve ' pyācāryo ' ntevāsī ṛtvig vā haret [var. lect. āharet]/ tad-abhāve rājā/
2. Ṛg-veda 3,31,2 [i,328]. Kane, HDh, III, 543; Geldner, Harv.Or.Ser., XXXV, 367, translates riktha as 'Erbe' = heritage. The German word 'Nachlass' comes close to the connotation of riktha.
3. The passage also indicates that daughters do not share the paternal property. Perhaps this refutes an opposite custom according to which the daughter would receive a share out of the paternal property. On the rights of the daughter, see below, 123ff.

not indicate the only cause of attaining power over a father's property. The passages in the Ṛg-veda and especially texts of the later Brāhmaṇas clearly reveal that it was a frequent occurrence that the father divided the property amongst his sons or handed it over to the eldest son when he became too old to manage the family affairs.[1]

The term used for the property of a father which is divided during his lifetime is dāya. The word occurs for the first time in a passage of the Ṛg-veda where the meaning seems to be a 'share' or 'reward' for exertion: "Some drive around the end of the earth, they have been harnessed to the yoke of the car. They distribute the reward for exertion, if Yama is kindly disposed in his house".[2] Though dāya is here the 'reward' for the priest for labour applied in sacrifice, the notion seems to be similar to the distribution of wealth by a father among his sons, as the later Brāhmaṇa-passages show.[3] The connotation of 'reward' seems attractive, as it

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1. See e.g. the marriage-hymn in the Ṛg-veda 10,85,42 [iv, 586f.] which apparently implies a son succeeding to the headship of the family.
2. Ṛg-veda 10,114, 10 [iv,729]. Transl. follows Geldner's, Harv.Or.Ser. XXXV, 333. The text is as follows: bhūmyā antaṃ paryeke caranti rathasya dhūrṣu yuktāso asthuḥ/ śramasya dāyaṃ bhajantebhyo yadā yamo bhāvati harmye hitaḥ//-
3. Geldner, ubi cit., 338, fn. to tr. of Ṛg-veda 10,114,10.

would suggest that sons may receive bigger or smaller shares at a distribution by the father depending on their relative merit, but we cannot stress this aspect in spite of the latitude of power the father had according to texts of the Brāhmaṇas and some of the Smṛtis.

Before we proceed to consider the passages in the Brāhmaṇas, we may trace the meaning of the verbal root from which dāya is derived. Dāya could be derived from one of two equally suitable roots: dā = to give etc. and dā = to cut, divide, mow. Grassman seems to be inclined to assign dāya to both roots.[1] Böhtlingk and Roth inform us that the term is derived from dā = to divide.[2] Monier-Williams gives dā as the root of dāya; it may also be derived from do = to cut, divide, reap, mow, and day = to divide, impart, allot.[3] We may add the opinion of W.D. Whitley who similarly assigns dāya to the root dā = to divide, share.[4] Mayrhofer[5] likewise relates the term with dā (dāti) = to cut, divide, mow. He assigns the root day (inter alia) to dā = to cut. Mayrhofer

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1. Wörterbuch zum Ṛg-veda, 1st ed., Leipzig, 1873: dāya = Anteil, Erbteil, derived from (1) geben and (2) abmaehen, abschneiden.
2. Petersb. Wörterb., s.v.
3. Sanskrit-English Dictionary, 474 col.2, 498 col.1, 469, col.3.
4. The Roots, Verb-forms and Primary Derivations of the Sanskrit Language, Leipzig, 1885, 72.
5. A Concise Etymological Sanskrit Dictionary, s.v.

also points out that the derivations of the two roots cannot always be clearly distinguished.[1]

It may be argued that both roots are equally suitable for deriving dāya, as the term may not only imply the 'cutting' and 'distributing' of the property, but also the act of 'giving'. However instances in the Brāhmaṇa-literature tend to show that dāya is derived from dā = to cut, divide (or do and day).

In the Nābhānediṣṭha legend as told in the Taittirīya-saṃhitā we read: Manuḥ putrebhyo dāyaṃ vyabhajat/ - "Manu divided (his) property amongst his sons."[2] In the Pañcaviṃśa-brāhmaṇa it is said: so 'kāmayatendre me prajāyāṁ pratyamuñcatto vā indrāya prajāḥ śraiṣṭyāyā tiṣṭhanta .../13// tasmād yaḥ putrāṇāṁ dāyaṃ dhanatamam ivopaiti taṃ manyate: 'yam evedaṃ bhaviṣyatīti//4// - "He (Prajapati) wished that amongst his progeny Indra might be the mightiest and fastened his wreath upon him. Thereupon the beings yielded the supremacy to Indra ... Therefore, they look upon him of the sons, who enter upon the best part of the property as one who will have success in the world."[3]

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1. Ubi cit., 32, on dātram.
2. 3,1,9,4-6.
3. 16,4,3-4 [ii,221]; tr. based upon Caland's, 431; dāya is here equated to dhana = wealth, which originally means 'precious metalls', 'booty', and also 'prize' in a contest; Ṛg-veda, e.g. 6,45,2; 12,15; 7,32, 12 etc. For 'booty' see 10,84,7, e.g.

Whereas we can infer from this passage that the father was at liberty to distribute the property according to his discretion, we find in another passage dāya being the property of an aged father which is divided during his lifetime though this time not by him, but by his sons: tad u hovācābhipratāraṇo jīrnaś śayānāḥ/ putrā hāsya dāyaṃ vibhejire/[1]

Once partitions took place more frequently after the death of the father the term dāya would be used to describe the property of a deceased man, too, and in so far coalesce with the meaning of riktha. There may be some scope for distinguishing riktha from dāya at this early stage of the development of the law by describing dāya also as the share in the specific possession of a person within the wider framework of the kula. In this context dāya may consist of an advancement from the father or it may be a share received at a partition between collaterals (including subsequent accretions). As the notion of partition of dāya did not clearly imply more than a distribution for convenience and did not necessarily involve (as now) a separation in point of status, some residual rights of the collaterals[2]

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1. Jaiminīya-br. 3,156; cp. also the parallel version of the Nābhānediṣṭha legend in the Aitareya-br. 5,14,2ff. where not Manu, but his sons divide the property.
2. See the texts which begin with vibkaktā avibhaktā vā or similarly.

and of the father continued to exist. However once the property was allocated the share received tended to become, for purposes of inheritance, the property (riktha) of the descendants of the brother or son and could not easily be claimed by the collaterals, nor by the father. The Dharmaśāstras moreover tend to support the exclusive claims of the brother during his lifetime so that eventually, once a share was apportioned, separation of status (see below, ch.IV). between collaterals would be the consequence, and dāya was here congruent with riktha. But during the lifetime of the son, that is to say in the patriarchal family, the father who had allocated property (dāya) to the son still tended to have some claim on the property of the son during the latter's lifetime and vice versa (see below text of Hārīta, p.139), though for purposes of inheriting the property (riktha) the father was excluded e.g. by the son's son.[1]

The final position in the Dharmaśāstras as regards the estate of a father visualises two basic situations in which one can become owner, namely, according to the Gautama-dharmasūtra, one can become owner on account of two causes, riktha and saṃvibhāga.[2] Riktha is the cause or mode of

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1. See Manu's text na bhrātaro na pitaraḥ... cit. below, 102, 76.
2. 10,38 [166]; svāmī riktha-kraya- saṃvibhāga-parigrahādhigamesu .../ "An owner occurs in cases of inheritance, purchase, partition, garnering, and finding ..." J.D.M. Derrett's tr., ZVR 64 (1962) 34.

acquisition of the father's property at his death, saṃvibhāga is the cause or mode of acquisition of the father's property when he divides it in his lifetime. Gautama probably does not mention dāya as a cause, as this term comprises both modes of acquisition by now: a share in the estate or the whole estate of deceased or living man. In the Manu-smṛti on the other hand, dāya is seen as the only cause to acquire property from a father and it is thus implied that dāya is a share in the estate (or the whole estate) of a deceased or living man.[1]

The fact that the Dharmaśāstras maintain not only that property should be divided only after the father's death, but also that the father may divide it during his lifetime, thus stressing either the patriarchal unity of the family or supporting its dissolution, may reflect the wish of a father to advance some of his sons giving them a chance to avail themselves of the plentitude of land yet to be cleared and colonised by private initiative. Advancement by shares may also have been desirable when there was lack of space in the house, or if strife occurred in a polygamous household. Apart from this we cannot negative the possibility of the influence of customs according to

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1. Manu-smṛti 10,115: sapta-vittāgama dharmyā dāyo labhaḥ krayo jayaḥ/ prayogaḥ karmayogaśca sat-pratigraha eva vā// See Derrett, ubi cit.

which sons and daughters would leave the parental home at marriage to found their own individual households.

At this stage we may conclude that dāya is derived from the root dā (to cut, divide) and that it connotes the share in the property (or advancement parentally) of a deceased or living man or that it may mean "inheritance". If we were to translate dāya only by 'inheritance' (in the sense of the mode of acquisition of property) or, as Colebrooke did, by 'heritage' (in the sense of the property inherited) we must keep in mind that these words carry the unfortunate implications of the developed Roman legal system of classical times which are embodied in the maxim: hereditas est successionis in universum ius quod defunctus habuit and of which nemo est heres viventis is a corollary. Dāya, as we have seen, originally indicates that the father divides his property during the lifetime whereas later dāya may coalesce with riktha which seems to have had originally much more similarity with hereditas - the 'inheritance', the property left by the deceased.

CHAPTER II

THE RELATIONSHIP BETWEEN FATHER AND SON - AND FURTHER DESCENDANTS

I. Mutual Relationship in the Material and Spiritual Sphere.

(1) Mutual Dependency: Maintenance as a Personal Obligation.

For the relatively poorer householder of the pre-legal era i.e. the period prior to the composition of legal texts the existence of sons as such implied wealth, prestige and welfare, etc. Thus we read e.g. in the Yajur-veda the following prayer: "May this my sacrifice bring stores of children, with ten brave sons, full-companied, for welfare, lifewinning, winning offspring, winning cattle, winning this world of ours and peace and safety. May Agni make my progeny abundant".[1] To have many sons - in any tribal-pastoral or semi-agricultural society - implies assistance in work, increase in wealth, protection against the enemy[2], and guarantees the continued existence of the line. A householder was in a dependent position once he grew older and conversely the son's status within the family increased once he was in a position to work and acquire more property than the father. There are two references from the Brāhmaṇas which refer to

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1. 19,48: tr. Griffith, 213.
2. "May our enemies be destitute of offspring", runs a passage in the Ṛg-veda, cited in the Vās.-dh.sū. 17,2.

this state of affairs in general terms. In the Taittirīya-saṃhitā it is said: "... As the father approaches the son when he is in need ... as the son approaches the father when he is in need ..."[1] In the other reference, from the Śatapatha-brāhmaṇa, we come across the term which appropriately describes the personal relationship between the head of the family and his dependents, a relationship which in a subsistence economy forms the primary basis of the duty of maintenance, namely upa-jīv = to 'live on' somebody, to be dependent on: "In the first part of life the sons live upon (or: under) their father ... in the last part of life the father lives upon (or: under) their sons.[2] A certain indifferent attitude in the actual behaviour of sons towards their parents has already been mentioned, when we saw that sons divide the property of the aged father against his will, and when it was suggested that a father may become a parivrājaka. Especially when there was no dāya, the maintenance of parents may be endangered.

In the Pāli-Canon the duties of a son to maintain his parents, even if by begging,[3] are repeatedly stressed

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1. yathā pitā putraṃ kṣita upadhāvati ... yathā putraḥ pitaraṃ kṣita upadhāvati ... Tait.-saṃ. 6,5,10,1-2 [545]. W. Rau, op.cit., 44.
2. pūrvavayaśe putraḥ pitaram upajīvanti ... uttaravayaśe putrān pitopajīvati. Śat.-br. 12,2,3,4 [ ]. Rau, op.cit., ibid.
3. Samyutta Nikāya I, 181. Āp.-dh.sū. 2,10,1-2; Gaut.dh.sū, Baudh.-dh.sū. 2,5,19.

and the passages indicate that the actual behaviour of sons may not always have guaranteed the maintenance of parents by sons.[1] This personal obligation of maintaining parents, besides the wife, and a minor son is enjoined in a text which has been ascribed to Manu in the Mitākṣarā: "Manu declares that one must maintain one's aged parents, a virtuous wife and a minor son by doing even a hundred bad acts".[2] Other Smṛtis, besides the Arthaśāstra, prescribe punishment for persons neglecting the maintenance of aged parents, wife and children.[3]

(2) The Identity of Father and Son.

Another feature which contributed to the mutual relationship between father and son is the belief in the psychical and physical immortality of the father by the existence of a son.[4] The belief that the father survives in

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1. Wagle, 183-186. See also the Cyavana legend referred to by Rau, op.cit., the sons refuse to leave their father behind because they are afraid to earn a bad reputation. The śāstras make it a duty for the sons to care for him. Cp. the story of the wealthy Brāhmaṇa being ousted by his sons, above, 33.
2. Cit. by Kane, HDh, III, 803 and fn. 1559.
3. Kane, ubi cit.
4. Already B.W. Leist in his Altarisches Jus. Gentium 18ff., has pointed to this feature as one of the traits common to many Indo-Germanic peoples and C.W.Westrup has elaborated this point in his Introduction to Early Roman Law, III, i, 197ff., 219ff. The notion is, however, susceptible of occurrence in any patrilineal community. - See also Śat.-br. 12,4,3,1, cit. by W.Rau, 46; ya u vai putraḥ sa pitā, yaḥ pitā sa putraḥ/ - "The son is as the father, the father is as the son". See also the legend of Śunaḥśepa as told in the Ait.br. 7,13,9,10. Āpastamba 2,9,24,1ff and Baudh. 2,9,16,7ff. perpetuate this idea.

the blood of the sons is thought to be based on the desire to extend life beyond death by means of a son, to see one's duties performed and unfinished works completed. A passage from the Bṛhad-āraṇyaka-upaniṣad expresses this point vividly: "Next follows the handing over. When a man thinks he is going to depart, he says to his sons: 'Thou art Brahman [the Veda, so far as acquired by the father]; thou art the sacrifice [so far as performed by the father]; thou art the world'. The son answers: 'I am Brahman, I am the sacrifice, I am the world'. Whatever has been learnt [by the father] that, taken as one, is Brahman. Whatever sacrifices there are, they taken as one, are the sacrifice. Whatever worlds there are, they taken as one, are the world. Verily here ends this [what has to be done by a father, e.g. study, sacrifice]. 'Hence [the son], being all this preserved me from this world', thus he thinks. Therefore, they call a son who is thus instructed (to all this), world-son (lokya), and therefore they instruct him. When a father who knows this, departs from this world, then he enters into his son together with his own spirits (with speech, mind, and breath). If there is anything done amiss by the father, of all that the son delivers him, and therefore he is called putra, son.[1]

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1. On the derivation of putra M. Mueller says in a fn.: "from pu (pūt), to fill, and tra, to deliver, a deliverer who fills the holes left by the father, a stopgap. Others derive it from put, a hell, and tra, protect; cf. Manu, 9,138". The second derivation is apparently the later one and is a typical example in the Dharmaśāstra of the method of cementing legal objects with the help of religious concepts.

By the help of his son the father stands firm in this world. Then these divine immortal spirits (speech, mind, and breath) enter into him."[1]

The identification of father and son is the very reason why the son comes to be entitled and has a preferential right to 'succeed' to his father, before anybody else can succeed who does not represent the personality of the father. Though the Dharmaśāstras stress the absolute power of the father as regards the time of partition and to some extent even as regards the mode of partition, the necessity of having a son is, however, found in many passages of the Dharmasūtra- and Smṛti-literature, not only because of the immortality a son guarantees, but also as the provider for the ancestors.[2] The original primitive idea of the survival of the father in the son, together with the development of the ancestor cult made the son the natural successor to the rights and duties of the father who cannot easily deprive them of their heritage. It is only by a son that the father

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1. 1,5,17; M.Mueller's tr., SBE, XV, 96. See Röer's ed., III, 303ff.
2. Āp.-dh.sū. 2,9,24,1ff.; tr. SBE, II, 158; Baudh.dh.sū. 2,9,16,1ff.; tr.SBE, XIV, 271; Gaut.-dh.sū. 12,32 on the importance of the son. Vas.-dh.sū. 17,1ff.; tr. SBE, XIV, 84; identical with Viṣṇu-dh.sū. 15,4; Manu 9, 107; for sons and grandsons see Vas.-dh.sū., ibid., Viṣṇu-dh.sū. 15,46; Manu 9, 137; cp. also Saṅkha-Likhita and Hārīta, cit. in Jha, HLS, II, 171.

can 'live on' after death, a son who will complete his works, perform the funeral ceremonies, and perform the prescribed sacrifices. Thus the father's property will not lose the function and purpose which it had when the father was alive and a pious father will have to ensure that a son can eventually perform his duties by not squandering his property.

The idea that only the son can complete the father's work and perform obsequies etc., i.e., the duties of a son whose non-performance would cause the resentment of the deceased, may at some stage also have safeguarded the rights of a minor son against the members of the family like father's brothers, their descendants and the widow-mother. The precedence of the son over all other heirs is expressed in a śloka which indicates that "not brothers, nor father are to share the property of a deceased brother, but the son": na bhrātaraḥ na pitarah putrā riktha-harāḥ pituḥ/[1]

Gradually the corollary that only the son can complete the works and repair the ommissions of a father, established the rule that the son has to repay all the material debts as well.

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1. Manu, 9, 185.

(3) The Liability for Debts of a Deceased Person.

(a) The liability of sons and grandsons.

According to the Arthaśāstra the sons are obliged to pay the debts of the father with interest after his death, and this obligation exists even if there is no property of the father in the hands of the sons; other dāyādas, in the absence of sons, have to pay the capital with interest if they inherit the estate, whereas co-debtors and co-sureties are liable (naturally) whether the deceased had left any assets or not.[1] The debt of the father thus becomes the debt of the son, and if a grandson exists, certain ancestral obligations are even transferred to him, similarly as in the case of the son, even though he may not have received any ancestral property: "But sons, grandsons, or heirs inheriting the property shall (be liable to) pay a (debt about the repayment) of which, the place and the time are not fixed".[2]

The liability of sons and grandsons to discharge the father's personal obligations after his death or on becoming

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1. Arthaś. 3,11,14 [113]; pretasya putrāḥ kusīdaṃ dadyuḥ, dāyādā vā riktha-harāḥ, saha-grāhiṇaḥ, pratibhuvo vā/.
2. Arthaś. 3,11,17 [tr.263; 113]: asaṃkhyāta-deśa-kālaṃ tu putrāḥ pautra dāyādā vā rikthaṃ haramāṇā dadyuḥ/ In the context this obviously refers to suretyship-debts of which the preceding two sections and the subsequent sections speak. See fn. , below.

a parivrājaka or after his absence for twenty years has also found its place in the Dharmaśāstras, as e.g. in the Viṣṇu-dharmasūtra which moreover expressly declares that remoter descendants, i.e. the great-grandson etc. are not liable against their will.[1] Bṛhaspati lays down that one should discharge one's father's proved debts as his own, that is with interest, the grandson should pay the principal only, whereas the great-grandson shall not be liable for the great-grandfather's debts.[2] The order of priority according to which the debts are to be repaid is laid down by Bṛhaspati as follows: grandfather's, father's, one's own debts.[3]

Sons may be liable for the debts of the father even during his lifetime, if he is for some reason incapacitated to pay the debt. The causes of his incapacity are listed in the Smṛtis and include for instance when the father is gone to a distant country or is afflicted with an incurable disease, or has become an ascetic, in other words situations

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1. 6,27-28 [31; Dh.K.678a]: dhana-grāhiṇi prete pravrajite dvidaśa samāḥ pravasite vā tat-putra-pautrair-dhanaṃ deyaṃ/27/ nātaḥ param anicchubhiḥ/28/ See also Yājñ. 2, 50 and Kāty. 555 and 556.
2. Bṛh. 10,114 [117; tr. SBE, XXXIII, 328, śl.49] Cp. also Yājñ. 2,50. Kāty. 556. A possible explanation of the distinction (as suggested by Dr. J.D.M. Derrett) is that originally the descendant was liable only for the principal and that when liability for interest was recognised, the son, because of his identity with father became liable for interest.
3. 10,113 [117; Dh.K. 707].

where the sons have replaced the father in the management of the property.[1]

The son is not liable if he is a minor, suffers from psychical or physical disease or is otherwise incapable of inheriting, but a son's son not suffering from such disabilities has to pay the principal (only) in his place.[2]

Finally the liability of sons and grandsons does not exist even if ancestral property is in their hands, when the debt is avyāvahārika, a debt which is 'unenforceable by process', because (scilicet) of illegality or immorality. Instances of avyāvahārika debts are debts incurred for drinking and gambling, idle promises made to bards, wrestlers etc., debts incurred under the influence of wrath or illicit love (kāma-dānam; to pimps?), and the balance of fines or tolls.[3]

(b) Liability for Suretyship-debts.

An additional important cause of the liability of sons existed in connection with suretyship (prātibhāvyam) undertaken by the father, to which we have already referred

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1. Yājñ. 2,50; Nār. 4,4; Viṣṇu 6,27; Kāty.548-50.
2. Kāty. 552-3; 556-7.
3. See texts cited by Kane, HDh, III, 446f. śulka, generally understood to be fines or the balance of fines in this context, may also refer to bride-price according to Haradatta on Gautama 12,38 [Dh.K.677f.] Cp. also Arthaś. 3,16,19.

shortly.[1] Three kinds of suretyships are especially prominent in the Smṛtis, though some authors know four or even five kinds which, however, we need not specify in this context. The Yājñavalkya-smṛti with its usual brevity and compactness, mentions (a) Suretyship for appearance, that is the surety undertakes to produce the debtor when required; (b) suretyship for honesty, where the respectability etc. of the debtor is guaranteed; and (c) surety for payment.[2] The son is not liable for the fulfilment of obligations arising out of suretyship for 'appearance' and 'honesty', which, though probably the most ancient types of suretyship, must have involved the surety only in a strictly personal liability. The son was, however, after the death of the father, liable for debts arising from a suretyship for payment undertaken by the father, and this liability arose without agreement by the son and involved only the son, that is the suretyship was inherited only by the first generation of

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1. See
We have been considerably aided in the understanding of the nature of suretyship in Hindu law by a forthcoming article entitled 'Suretyship in India: The Classical Law and Its Aftermath' [Rec.Soc.Jean Bodin] by J.D.M.Derrett of which the author kindly gave a typescript for perusal. See also L. Sternbach, Juridical Studies in Ancient Indian Law, no.12, 'Suretyship', Suppl. to Bhāratīya Vidyā 7 (1946) 25-60.

2. Yājñ. 2,53a [170]; darśane pratyaye dāne prātibhāvyam vidhīyate/ Bṛh.10,74[111] adds'delivering the assets of the debtor' which Yājñ. would subsume under 'dāne'.

male descendants.[1] Perhaps this may be ascribed to the latent presence of the belief in the identity of father and son which supported the legal obligation conveniently.

To the rule that sons were not liable for suretyship debts arising from suretyship for 'appearance' and for 'honesty' and that only sons are held liable for suretyship for payment, there is the exception that if the surety received a reward, a payment for his services or if he had received a pledge (or the equivalent) sons or heirs would be liable in all cases of suretyships on the death or the disappearance of the father.[2] The undertaking of suretyship for reward must have been most common and must have been prevalent especially among communities engaged in trading or pursuing some craft.[3] Here we may perhaps find the reason why the Gautama-dharmasūtra seems to militate against the liability of sons for all kinds of suretyship-debts. The fact that Gautama mentions commercial debts immediately after suretyship debts, amongst those debts for which a son is not liable, could be ascribed to the intention of the author to prevent involvement of Brāhmaṇas and their sons in strictly commercial commitments and activities and to confine each community to its peculiar source of income which

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1. Yājñ. 2,54; Viṣṇu 6,41; Manu 8,160; Kāty.561; Vyāsa, cit. by Aparārka, 656. See texts cit. at Jha, HLS, I, 186f.
2. See Derrett, op.cit., Manu 8, 161-2. Kāty. 534.
3. Derrett, ubi cit.,

is, in the case of Brāhmaṇas, the acceptance of gifts.[1]

(c) The Liability of the Great-grandsons.

The question whether a great-grandson is personally liable to pay the debts of the great-grandfather is discussed by MM P.V.Kane who refutes the opinion of J.Jolly. Jolly had believed that the great-grandson was not liable for the debts contracted by the great-grandfather and conversely that he did not inherit the property. Kane correctly states that the great-grandson is liable provided he has inherited the (or some of the) ancestral estate. Thus it might be possible to conclude that the only descendants who are to a varying degree liable for the debts of a person are the son and the grandson. On the other hand there are Smṛti-passages attributed to Nārada and Kātyāyana which unambiguously state that obligation ceases with the fourth'.[3] The stress with which

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1. Gaut. 12,48 [208 ; tr. SBE II, 241]. Cp.10,1ff. and 39ff. This view would be more in consonance with the character and purpose of the Gautama-dh.sū (for which see Derrett in JESHO, 1(1957) at 68f. and in 7(1964) at 103. Sternbach, however, sees in Gautama one of the earliest texts and the beginning of an evolution of the law of suretyship (Op.cit.,). For the age of Gautama see now S.C.Banerji, Dharmasūtras,..., ch.3.
2. See Kane's remarks at HDh, III, 443f. and on Kāty. at 560.
3. Nār.4,4[46f.]: kramād-avyahātaṃ prāptaṃ putrair yannarṇam-uddhṛtam/ dadyuḥ paitāmahaṃ pautrās tac-caturthān-nivartate //- "The grandsons shall pay the debts of their grandfather which having been legitimately [or:unresistedly] inherited by the sons, has not been paid by them; the obligation ceases with the fourth descendant". Kāty.560.

some Smṛtis negative the liability of the great-grandson and the discussions of these texts by later commentators suggest that the topic was disputed. It was attempted to base the liability of the great-grandson on his duty to offer piṇḍa to three deceased ancestors. A passage from the Nārada-smṛti combines the duty to free the father from debts with the idea that three ancestors subsist on the fourth in descent for the repayment of their twofold (spiritual and secular) debts.[1]

But the purpose of the ancestral cult, it should be remembered, was to ensure the continuity of the line and adherence of the property to one's own descendants in spite of the claims of other relatives like a surviving widow, collaterals etc. When a great-grandson was born, he would (as a minor) not be entitled to participate in legal transactions, but, attaining majority or ceremonial competence, he would eventually be the provider of the ancestral cult and the link between the past and future generations. He would eventually be in the possession of ancestral property, especially lands, and he may thus be liable to pay ancestral debts out of the inherited property. But it was obviously considered unjust to make him personally liable, if he was not a major at the time of the transaction and did not inherit any property.

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1. See Nārada 4,5-9; cit. by Kane, HDh, III,416; see fn. 676 at 417, ibid.

(4) Participation of Three Generations in the Legal Sphere.

In the big patriarchal household whatever property is acquired is acquired by or on behalf of the eldest male ascendant who is the head and manager. A passage by Hārīta inculcates this principle in clear terms: "While the father is living the sons have no freedom in regard to the appropriation, giving away or realising of property".[1] The dictum of Manu (see above, 39) that a woman, sons and slaves have no property and whatever wealth they earn is acquired for him to whom they belong, is equally unambiguous. But whereas these rules reflect a family in which the authority of the father tends to be absolute so that sons etc.are merely dependants and eventual heirs, other rules reflect that the mutual ties between father and son and grandson were much more complex in the legal sphere.

We have already referred to the liability of a son and a grandson for the debts of a father. Probably it was easier to get credit when a person had sons who formed an additional 'security' for the creditor.[2] A description of

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1. Cit. in the Kṛtya-kal., 651: jīvati pitari putrāṇāṁ-arthādāna-visargākṣepeṣu na svātantryam/

2. According to custom a father even could pledge or sell his son when he had contracted a debt or is in need of livelihood. See Milinda's Questions, tr. I.B. Horner, vol.II, 102. See above, 44

the relationship between the creditor and debtor and his descendants is given by Bhavasvāmin on the śl. of Nārada which deals with the liability of the descendants.[1] The passage incidentally illustrates a distinction between personal and real security for debt which is of great interest in itself.

> A legitimate proven debt has to be paid by the sons whether they are making use of the sum borrowed or not. In default of the sons (i.e. in their absence because of death or disappearance) the grandson has to pay. In this way a bond-amount can be exacted from three generations including the original debtor but excluding the great-grandson. In the third generation a new bond must be obtained (in default of payment), as otherwise the obligation would cease thereafter. As this renewal is not certain, the author points out that if a debt is secured by a possessory mortgage, the liability does not cease. This is the reason why people incur debts (on personal security) to redeem their mortgaged property, for an obligation does not cease in the latter case even upto the tenth generation.[2]

A further instance that three generations at a time are contemplated in legal formalities is the text of a

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1. See above, 82
2. Nāradīya-manu-saṃhitā I,4 [21]: kramāt prāptam-ṛṇaṃ-avyahātam-avisaṃvāditam/ ... avisaṃvāditaṃ tu putrair na dattaṃ bhujyamānam-abhujyamānaṃ vā tat pautro dadyāt/ caturthāt tu nivartate/ ekena patreṇa tri-puruṣaṃ labhyate/ tṛtīye tu punaḥ patraṃ kartavyam/ akaraṇe tad-doṣāc-caturthe hīyate/bhūmyādiṣu bhujyamāneṣu na hāniḥ/ ata eva ṛṇa-grahaṇaṃ kṛtaṃ-ādhamarṇa- nivṛttyartham/ ādhamanaṃ tvādānād daśa-puruṣam api na hīyate//

grant of land etc. by the king to a person executed on a copperplate or cloth, which includes the son and the grandson as the recipients, whereas the great-grandson is not expressly mentioned.[1] Unbroken adverse possession by three generations confers (in effect) ownership upon the fourth.[2] When e.g. the Yājñavalkya-smṛti states that the son has a right equal to the father in ancestral immoveables and nibandhas acquired by the grandfather, we find again that only three generations participate in practice in the legal sphere. The rules on debts incurred for the purposes of the undivided family contemplate a paternal uncle as a head of an undivided family which visualises jointness within a pattern of three generations of males. But this rule simultaneously anticipates the imminent break-up of the family and the settlement of family debts at the time of partition: "The debts which have been incurred by the ... paternal uncle, ... should all be paid by the coparceners at the time of partition".[3]

Further illustrations could be cited, but the foregoing instances suffice to show that unit of three generations had a series of joint legal responsibilities and

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1. Bṛhaspati 6,20ff.,[22; tr. SBE, XXXIII, 306]: ... putrapautrānvavānugam/
2. Kāty. 315-8, 321-4, 326-8.
3. Kāty. 846; cp. Nārada 4,3, [46].

duties in a varying degree. We may suggest that the limitation to three generations was based upon the number of generations of which an undivided family may have been normally composed and functioned in the legal sphere. The probability that a great-grandson is living is marginal and, as we have said, he would usually be a minor and so disentitled to participate in legal transactions. He could not be made personally liable for the debt of the grandfather.

It is significant that the Smṛtis as well as the Arthaśāstra refer to the unity of four and the bond of sapiṇḍaship only in the context of inheritance, probably to safeguard the claim of a great-grandson to property deriving from the great-grandfather at the latter's death. The main importance of the great-grandson at such a stage of the life-cycle of the undivided family is the desire that continuance of the kula be assured. Moreover he represents a predeceased father and grandfather in a partition between agnatic collaterals.

II. The Concept of Sādhāraṇam

(1) From the indications given in the preceding section it seems clear that especially the son was more than just an appendage of the father and that father and son were in fact closely dependent in the material and socio-religious sphere. As far as the material sphere is concerned this

nexus finds its expression already in two passages of the Brāhmaṇas. The first is from the Taittirīya-saṃhitā: pitaiva tat putreṇa sādhāraṇaṃ kurute/ tasmād āhur yaś caivaṃ veda yaś ca na - kathā putrasya kevalaṃ kathā sādhāraṇaṃ pitur iti/-"The father creates sādhāraṇaṃ with the son. Therefore they say - whether one thus knows or knows not - how does the sādhāraṇaṃ belong only to the father and how only to the son?"[1] The concept is similarly expressed in the Aitareya Āraṇyaka: yatra ka kva ca putrasya tat pitur, yatra vā pitus tad vā putrasyety etat/ tad uktaṃ bhavati/- "Wherever something belongs to the son, it also belongs to the father, or where something belongs to the father, it also belongs to the son, as you know; that is a dictum".

It may be worthwhile to trace the etymology of the term sādhāraṇaṃ and its application in some legal texts, because such investigation may assist us in understanding the relationship between father and son which constitutes one of the central aspects of the law of the joint family.

(2) The Derivation of the Term.

The term s. is derived from ā + dhṛ = to hold, keep,

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1. Tait.-saṃ. 2,6,1,6-7 [ ]; this and the following passage are quot. by Rau, 44.

support. The noun ādhāra occurs with the meaning 'support', 'substratum' etc.[1] In the Nārada-smṛti ādhāra accordingly has the meaning of 'capital' for people engaged in a joint business: "When several partners are jointly carrying on business for the purpose of making profits, the supplying of capital forms the basis of such business".[2]

(3) Sādhāraṇa (Adj.)

S. used as an adjective finds application if something is 'common', or 'commonly applicable' to the whole of the society, i.e. the four varṇas, but may also be used if something is 'common' or ('peculiar' to a closed group like a caste, guild, family, gotra etc.. To quote illustrations, the sources of property which are sarva-sādhāraṇa = 'common to all' are riktha ('inheritance'), kraya (purchase), samvibhāga (partition), and parigraha (seizure; Maskari glosses parigraha as strīdhana in the sense of 'dowry' which becomes the property of the husband. Dh.K. 1122 b.) and

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1. Cp. Monier-Williams. Sanskṛit-English Dictionary; the Petersb. Wörterbuch lists the meanings 'Stütze', 'Stützpunkt', 'Unterlage', Rückhalt', 'Behälter', and sā + adhāra = 'eine Stütze habend'.

2. Nār. 3,2,[133; Dh.K.780]: phala-hetor upāyena karma saṃbhūya kurvatām/ ādhāra-bhūtaḥ prakṣepas tenottistheyur-aṃśataḥ//. Sādhāra literally means 'having or resting on the same support'.

adhigama (finding),[1] but the 'peculiar' substratum or source of acquisition to Brāhmaṇas are 'gifts', to Kṣatriyas 'conquest', 'earning' to Vaiśyas and Śūdras.[2] According to Nārada there are three sources of property, namely that which is received by inheritance, as an affectionate gift, and that which is received with one's wife: sādhāraṇaṃ syāt trividham...//46// kramāgataṃ prīti-dāyaṃ prāptaṃ ca saha bhāryā/ aviśeṣeṇa sarveṣāṁ varṇānāṁ trividhaṃ dhanam//47//[3] Similarly e.g. there are special ordeals for each of the castes, though the kośa ordeal is common to all: sādhāraṇaḥ samastānāṁ kośaḥ ...[4]

Each group has its particular dharma in common and the peculiar dharma which the group of workmen and 'slaves' has in common is characterised by the absence of svatantra, the want of independence.[5] The particular effort a brother devotes to the common object of a family and whereby he does work which ought to be done jointly by the brothers ~~provides~~ would also

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1. Gaut.dh.sū. 10,38 and Vijñāneśvara [; Dh.K.1122]; the Gautama-mitākṣarā comments: sarva-varṇa-sādhāraṇam svāmya-kāraṇāni = "ø causes of ownership common to all varṇas" [Dh.K. 1122b].
2. Gaut.-dh.sū. 10,40-42 and Mitākṣarā prooem. to Yājñ.2,114.
3. Nār.4,50 [62; Dh.K. 1130bf.] Bṛhaspati 7, 8-9[70].
4. Nār., cit. e.g. in the Sm.-ca. 103; Dh.K. 453a.
5. Sm.-ca. on Nār. 8,4 [Dh.K.825b].

expressed with the help of sādhāraṇa.
~~another use for the term.~~[1]

'Common Property' = sādhāraṇa-dravya or -dhana, is frequently found in medieval texts, thus e.g. in an explanation of the terms bhāṇḍa and piṇḍa by Bhavasvāmi on a passage from the Nāradīya-manu-saṃhitā.[2] The tendency to consider the property of a father simultaneously as the son's appears in many medieval texts and the term used is sādhāraṇa-dhana, thus e.g. when Caṇḍeśvara Ṭhakkura says about the passage by Hārīta:[3] "Receipt means using the joint wealth independently of the father".[4]

(4) Sādhāraṇaṃ (Noun)

S. quite frequently indicates the community of ownership in a natural body such as the family or in a corporation created by consent. Thus we get s. as the common property of a joint concern (sambhūya-samutthānam) and the passages mostly refer to the case where a partner deals dishonestly with the common property: ... sādhāraṇasya -

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1. Bhavasvāmi on Nāradadīya-manu-saṃhitā 13,35[156]: sādhāraṇa-prayojana-tat-paraḥ sādhāraṇa-kāryaṃ cet kurute,..
2. 3,4[85]: Bhāṇḍa-piṇḍa-vyayoddhāra-bhāra-sārānvavekṣaṇam/ kuryuste vyavahāreṇa samaye sve vyavasthitāḥ//4// Bhavasvāmi: bhāṇḍaṃ sādhāraṇa-dravyeṇa gṛhītaṃ dravyam/ piṇḍaḥ sarva-samudāyaḥ/
3. See above, 84
4. Vi.-ra., 461: arthādānaṃ pitṛ-nairapekṣaṇa sādhāraṇa-dhana-grahaṇam.

lāpi.[1] In principle one can only deal jointly with such property.[2] If a member of a corporation damages the common property, he should be turned out of the community, according to a dictum of Bṛhaspati which is explained in the Smṛti-candrikā by the instance of a member of the corporation siding with a person who has been found guilty to pay a fine which would go towards the joint stock.[3] Here sādhāraṇam approaches the meaning of 'common interest' which exist among the partners of a joint concern.[4] A passage by Vyāsa, as cited e.g. in the Smṛti-candrikā, tells us that there may be common immoveable property of a gotra which should not be sold or given away without the consent of the other members of the gotra - which presumably reflects a right of preemption.[5] If several brothers remain undivided after the

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1. Yājñ. 2,237; Viṣṇu 5,11ff. Jha, HLS, I, 521f.
2. Kāty. 697: sādhāraṇaṃ tu yat-krītaṃ naiko dayān-narādhamaḥ/ nādadyān na ca gṛhṇīyād vikrīyāc-ca na caiva hi - "If a thing jointly owned (by several) were purchased, a single vile man cannot deliver it (to the buyer). It should not be received nor taken, nor should it be sold".
3. Bṛh. 17,15 [152]: yastu sādhāraṇam hiṃsyāt .../... sa nirvāsyaḥ purāt tataḥ// Sm.ca., 527: sādhāraṇaṃ daṇḍādi-dravyaṃ daṇḍyādeḥ sāhāyya-karaṇādinā nāśayet ity arthaḥ/
4. Capeller, Sanskrit Dictionary, inter alia gives the meaning 'community, common cause'.
5. 716: sthāvarasya/samastasya gotra-sādhāraṇasya ca/ naikaḥ kuryāt krayaṃ dānaṃ paraspara-mataṃ vinā// Dh.K. 1586; Jha, HLS, II, 117f. See also Derrett, Univ. of Ceylon Rev. 19(1961) at 113-4, where two texts of Vyāsa actually referring ~~of~~ to preemption are dealt with.

death of the father, the common property is for them sādhāraṇaṃ. This is very often used by Smṛti-authors and commentators.[1] For another instance see a passage from Nārada with the comment of Bhavasvāmin according to which the pitṛ-dhana becomes the sādhāraṇaṃ of the brothers and is charged with the expenses of the sacramental rites of the minor brothers, such as the upanayana and marriage.[2] In the sense of 'common property' s. appears, for instance, in the Kathā-saritsāgara where a Brāhmaṇa priest shares the village donated to him, with his fellow Brāhmaṇas.[3]

S. is obviously used in the case of brothers for the property which they hold jointly after the death of the father. But it is only by the time of the Mitākṣarā that s. is explicitly used in the sense of the common property of father and son in a technical sense. The Mitākṣarā introduced, as we shall see, a new theory and establishes the right by birth of a son in his father's and grandfather's assets. The Smṛtis, however, on the one hand tend to stress the

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1. See e.g. Vyāsa, cit. in Sm.ca., Vi.va., Apar., etc. Dh.K. 1231b; Jha, HLS, II, 34,613.
2. Nāradīya-manu-saṃhitā. 13,33[155]: bhrātṛṇāṃ bālānāṃ-pitrā akṛta-saṃskārāṇāṃ pitur-abhāve... bhrātṛbhiḥ pitṛ-dhanād upādāya sādhāraṇāt kartavyāḥ/
3. Ed., H. Brockhaus 18, 127: Yāṃśca prāpa nṛpād grāmāṃs tān sa sarvān mahāsāyaḥ/ tan-maṭhāśraybhir vipraiḥ samaṃ sādhāraṇaṃ vyadhāt//

independence of the father from the claims of the son and on the other hand turn against excessive use of patriarchal power. In practice, the situation as indicated by the two texts of the Brāhmaṇas which we have cited above, namely the subsisting of the father and his sons on property acquired by either of them, must have been considered normal, natural and decent. This was equally valid in the time of the Brāhmaṇas, the Smṛti-period and at the time of the commentatorial literature and in this connection we can assuredly cite the comment of Sāyaṇa on the two Brāhmaṇa passages which precisely reflects in practice the relationship between father and his descendants in the material sphere from the time when the passages were composed.[1] Commenting on the Taittirīya-saṃhitā Sāyaṇa says: "Indeed in practice a boy will earn property and keeping it with the object of preventing it from being common property and so having some means of livelihood for himself in future, will go and hide it instead of giving it to his father or brothers. But whatever is acquired by a father becomes the common property of the boy, his son, and his brothers. All of them in fact live upon such property".[2] On the Aitareya-

1. They are cit. in translation by Derrett in S.C.J. 19(1956) at 107; this translation is adopted here.
2. loke hi bālena yad-upārjitaṃ tad-dravyaṃ sa putra uttara-kāle sva-jīvanārtham/ asādhāraṇātvena samgṛhya guptaṃ karoti na tu pitre prayacchati na tu bhrātṛbhyaḥ/ pitrā tu yad-upārjyate tat-pitur bāla putrasya tad-bhrātṛṇāṃ ca sādhāraṇaṃ bhavati/ tena dravyeṇa sarve'pi jīvanti/ Tait.-saṃ. 2,6,1,6[Dh.K.1161a]. cont.

brāhmaṇa passage he elaborates: "In practice an object belonging to a son becomes in its entirety the property of his father wherever it may be, that is to say, in whatever different village it may be located; and the father will send for it and enjoy it. Moreover should any object connected with the father come to light in another village it becomes his son's property also, and even the son will send for it and enjoy it. For equity demands such reciprocal rights of enjoyment (or 'union consists in the mutual enjoyment of one another's goods')". (Dh.K. 1162a).

III. Conclusions

Sādhāraṇam implies the 'substratum' of 'basis of property' which the father would create or maintain in order to secure the fulfilment of the 'mutual interest' and to foster the 'mutual concern' which exists between father and son and grandson: sādhāraṇam is the property which forms the basis for the realisation of the mutual duties which existed between father and son in the economic and spiritual-religious spheres. The father's duty to maintain a son or sons during their minority was influenced by the consideration that the son would eventually have to maintain the parents ~~eventually~~. Thus the son anticipated the position of the father as a kind of reward for his exertion, resulting in a right to succeed to his father's position and property.

The right to succeed to his father's rights and duties also originated from the concept of the son being 'identical' with the father; the son was, therefore obliged to repay the debts the father might owe at his death. This eventually resulted in the legal injunction which imposed on the sons and the grandsons the obligation to pay the proven vyāvahārika debts of the deceased father. In many respects the sons and grandsons participate in the legal sphere which gives them some ill-defined claim on the property even if the father is functioning as the head of the family.

The sons also succeed to the father's important duty of maintaining the ancestral cult, and the male descendants thus form a tie which binds past, present and future generations. This continuity is similarly secured by property which was formerly in the hands of ancestors.

Co-ownership between father and son - in the developed legal sense - did not exist and is logically precluded in a system which was influenced by patriarchy. The notion of sādhāraṇam may have assisted, gradually, a movement from the son's expectation of succeeding to the father to ownership, even, of an interest in the grandfather's property (especially immovable property) in the father's hands. It is possible to see in legal texts traces of this movement. If there is co-enjoyment of the father's self-acquisitions it is natural that a desire to prevent unilateral alienations

of inherited property should arise a fortiori: once this is admitted the birth-right is only the next step. Sādhāraṇam, in psychological and economic terms would seem to be the key to this movement.

The son's right in ancestral land and other enduring sources of wealth were not the theme in the early legal texts, which are influenced by patriarchal notions according to which the father's will is decisive as regards the disposition of property, which was not divided into the categories of moveable and immoveable property as in later texts. But a check on the father's power to deal with ancestral property at his discretion may have been in existence very early and the Smṛtis eventually take account of this, declaring the land acquired by the ancestors, and sources of wealth which are permanent, to be types of property over which father and son have sadṛśa svāmya or tulya svāmitva, i.e. 'co-extensive ownership'.[1]

Thus the Yājñavalkya-smṛti declares the basic rule which has formed the centre of discussion in later commentaries: "The land that may have been acquired by the grandfather, as also the nibandhas and dravya[2], over all this

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1. sadṛśa means 'resembling', 'similar', 'conformable'; tulya means 'equal', 'similar', 'comparable', and is derived from the root tul which means inter alia 'to weigh', 'compare', 'make equal', 'counterbalance'; Monier-Williams, Sanskṛit English Dictionary.
2. The term nibandha means according to P.V. Kane, HDh, III, 575, fn.1082, a periodic payment or allowance granted by a king, corporation, village, or caste to a person, family, a maṭha, or a temple. See also Derrett, ZVR 64 (1962)74f.. Dravya often means gold, silver, and other moveables according to Kane, ib.

the ownership of both the son and the father is co-extensive."[1] Similarly other Smṛtis enjoin the equal ownership of father and son in the grandfather's property including moveables.[2]

But the co-extensive right of father and son amounted in effect only to the right of the son to an equal share at partition. However, the power of the father to alienate ancestral property became subject to limitations in order to prevent the father's jeopardising the maintenance of the family. While treating of the topic of 'resumption of gifts' (dattāpradānikam) the Bṛhaspati-smṛti declares that though the father may give away his self-acquired property, ancestral property may not be given away in its entirety.[3] Even if there is no ancestral property or in families where there was no distinction made between the grandfather's property and the father's self-acquired property, all property

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1. Yājñ. II, 122: bhūryā pitāmahopāttā nibandho dravyam eva vā/ tatra syāt sadṛśaṃ svāmyaṃ pituḥ putrasya cobhayoḥ//
2. Viṣṇu-dh.sū. 17,2; Bṛh. 26,10 [197; Dh.K.1180b] cit.also as Vyāsa's dictum: kramāgate gṛha-kṣetra pitā-putrāḥ samāṃśinaḥ/ paitṛke na vibhāgārhāḥ sutāḥ pitur-anicchataḥ// - Bṛh. 26,14 [197; Dh.K. 1179b]: Dravye pitāmahopātte sthāvare jaṅgame tathā [v.l.: 'pi vā]/ samamaṃśitvam ākhyātaṃ pituḥ putrasya cobhayoḥ. [v.l.: caiva hi]//- similarly Kāty. 839.
3. 14,5 [138; Dh.K. 803]: svecchā deyaṃ svayaṃ prāptaṃ.../ ... kramāyāte sarva-dānaṃ na vidyate//

being styled as the father's, the father is not free from the duty to maintain dependants which is incorporated by Smṛtis in the rule that the whole property should not be object to a gift.[1]

The patriarchal head of the family can be prevented from squandering property, at least if we follow Hārīta, who shows that the eldest son may exercise in certain circumstances a prerogative of management: "While the father is living, the sons have no freedom in regard to appropriating giving away or realising property. But if he uses property yielding to desires or whims, if he is absent or afflicted with disease, the eldest son should care for the property".[2]

But an actual positive right of the son to realise his claim to an equal share of the ancestral property or to control the powers of alienation of the father in respect of ancestral property is not unambiguously stated in those Smṛtis of which a coherent version has been handed down by commentators.

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1. Yājñ. 2, 175 [238 ; Dh.K.796]; Jha, HLS,I,266. Kāty. 638, but śl. 639 permits sale in time of distress or emergency conditions (āpatkāle); Nār.7,4-5[137; Dh.K.798b and 799] forbid the gift of the entire property when there is offspring even in 'times of distress'.
2. Cit. in the Kṛtya-kalpataru, Vy.K., 651 and Vivāda-ratnākara, 461, which reads kāmadāne and adds kāmadāne kāma-mātrādevārtha-dātari/- "Giving away wealth according to whims".

On the other hand, besides the existence of families which followed the law developed according to the patriarchal pattern, the existence of families where the ancestral property, especially lands, was simultaneously an asset property for future generations, with a corresponding weakening of the authority of the father in respect to such property, was noticed in passages of Smṛtis of which we have only fragments preserved by commentators, perhaps because these Smṛtis had committed themselves in too detailed a manner to customary practices. These Smṛti-passages tended to modify the patriarchal power in the interest of descendants and future generations. Thus a passage of Vyāsa says that immoveable property etc. is not freely alienable by the father: "Immoveable property and slaves, even though self-acquired, cannot be given away or sold without the consent of all one's sons. There can be no sale or gift of such property as would be the means of livelihood for sons already born and those yet to be born".[1] A text of

1. Jha, HLS,I,276; Dh.K. 1587ab: sthāvaraṃ dvipadaṃ yadyapi svayam-arjitam/ asaṃbhūya sutān sarvān na dānaṃ na ca vikrayaḥ// ye jātā ye'py ajātāś ca ye garbhe vyavavasthitāḥ// vṛttiṃ ca te'bhikāṅkṣanti na dānaṃ na ca vikrayaḥ// Sen-Gupta, 204,fn. 72, 209, fn.78, prefers the reading vṛtti-lopaḥ vigarhitaḥ, which means that the dissipation of maintenance is 'morally' wrong. But the first reading might have been literally applicable amongst communities where the father's alienation without concurrence of the sons was invalid by custom, whereas the second reading would apply to patriarchal families, where the father's legal rights persisted untrammelled by any claims of the sons apart from rights to maintenance and moral considerations.

Bṛhaspati postulates the consent of the jñāti as a necessary requirement for the gift of ancestral property.[1] Jñāti is an ambiguous term which normally refers to the agnatic kin. It may include the sons, the wife, perhaps even the daughter whose dowry was in danger, and agnatic collaterals.

IV. Affiliation and Proprietary Rights of Substitute Sons.

The necessity of having a son was, as we have seen, an essential condition for one's social, economic and ritual status. The belief that the father survives in the blood of the son would exclude 'sons' who were not 'begotten by oneself', and an aurasa son, 'a son of one's body by lawful marriage',[2] would have a primary claim upon the property of a father. He consequently ranks first throughout the Dharmaśāstras. But in case the father had no aurasa son, there was a variety of methods to procure for oneself 'secondary' sons who may happen to live in the household or whom one could attach to the family and who would serve most of the secular purposes, if not spiritual purposes.

Most of the Smṛtis deal with twelve kinds of sons establishing an order of preference according to which the sons were successively entitled to inherit the father's

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1. Bṛh.14,6[138; Dh.K.803b]: ... kramāyātaṃ ... yad-bhavet ... jñāti ... anujñātaṃ [v.l.] -mataṃ dattaṃ siddhiṃ avāpnuyāt//
2. See texts cited at Jha, HLS, II, 178.

property or to represent a deceased father if the ancestor allocated the property.[1] There is little evidence on the exact rights of the 'secondary' sons vis-à-vis his father's brothers and father's father. The secondary son's position might have been disputed by the agnatic relations of the father, but apparently the substitute's son's right to inherit the father's property, especially when the latter had lived separately from his agnates, was admitted. The dictum of Manu na bhrātaro na pitaraḥ putrā rikthaharāḥ pituḥ must have been equally applicable to the case of the substitute putra.[2]

In the Manu-smṛti the dattaka son attains prominence being placed third in the order of substitute sons.[3] It may be that the dattaka son had a better chance to become a son for all purposes in respect to the kinsmen of the father, when social respectability as formulated in the śāstra in terms of ritual ceremonies gained wider influence on the behaviour of the people. Most of the secondary sons could hardly be considered substitutes adequate to represent the family in the material and spiritual sphere. The kṣetraja

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1. See e.g. Manu 9, 158-60; the first six sons are said to be 'heirs and kinsmen' and the other six are said to be 'kinsmen and not heirs'.
2. Manu 9, 185: Commentators take this section to refer to a substitute son as well as to an aurasa.
3. For the development of the institution of adoption and the methods employed thereby see Derrett "Adoption in Hindu Law", ZVR, 60(1957) 34ff., 41-46.

son (i.e. a son who is the offspring of the wife by a kinsman or person duly appointed to raise up issue to the husband), highly placed in the order by many texts, is deprecated by Manu who describes this method of obtaining a son as 'a practice usual in breeding one's cattle' (paśu-dharma, Manu 9,66.), but not suitable for people who follow the Aryan way of life as understood by this law-giver.

The institution of adoption, however, was the most suitable method of procuring a son unobjectionable from the śāstric point of view, provided with a ceremony which would underline the value of the adopted son for spiritual purposes, e.g. at the śrāddha-ceremonies.[1]

The dattaka might have been objected to in early Smṛtis because he may come from a different gotra and the kinsmen of the adoptive father would claim some residual right on his property even after partition, a right which Manu intends to repress.[2]

A further step in undermining the position of the various secondary sons in the śāstra was taken by Smṛti-texts which declare some or all secondary sons as obsolete, i.e. declaring them as pertaining to law (dharma) which

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1. Vāsiṣṭha 15,1-9[44]. Kane, HDh, III, 663f. The notification to the king is presumably a remnant of his residuary right in the property. Cp. the case of Sudinna, above, 41f. In later times the king charged a fee for permitting this to happen.
2. Manu 9, 141.

should not be followed in the Kali-yuga,[1] though as a matter of fact many of the śāstric texts continued to refer to other secondary sons, probably reflecting local customs.

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1. Śaunaka or Āditya-purāṇa, cit. e.g. in Aparārka, 739 [1371a, 1383b.].

CHAPTER III

RIGHTS OF WOMEN TO PROPERTY IN THE DHARMAŚĀSTRAS

I. The Rights of a Woman as Wife, Widow and Mother.

(1) Introduction.

In the patriarchal kula where father and married sons live jointly, women tend to be under the protection of the males who are alone qualified to represent the family in the material and spiritual sphere. Women have to look after the internal household affairs and in a monogamous household the wife had in practice an extensive power in safeguarding the husband's peoperty.[1] But women were excluded from participating in a partition on an equal basis with men. The tribal background of the Aryan settlers during the period of the Brāhmaṇas would do nothing in establishing the rights of women in property. Passages which refer to lack of fitness of women in participating in (non-domestic) sacrifices dealing with Indra and other Vedic gods upon an equal footing with men provided the śāstric motivation for declaring women to be ādāyādas, i.e. non-sharers. A passage with has been utilized for this

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1. Digha Nikāya III, 190; Aṅguttara Nikāya III, 36-38. Wagle, 205, for the husband-wife relationship. See also Indra, The Status of Women in Ancient India, e.g. Ch.II. A.S. Altekar, The Position of Women in Hindu Civilisation, with valuable information. Indra's contribution must be read in the light of modern attempts to emancipate the Hindu woman.

purpose is from the Taittirīya-saṃhitā:"Women are devoid of indriya and are not entitled to a share".[1] The Baudhāyana dharmasūtra perpetuates the passage of the Tait.-saṃ. which is taken to mean the exclusion from a share at a partition of dāya, and not merely from a share in the soma-juice which must have been the original meaning. The reason for the exclusion is mentioned by the commentator of Baudhāyana, Govindasvāmin, and conveys the basic objection at all periods by most of the śāstric authors, especially by those believing in the strict patriarchal and patrilineal pattern of the family. Govindasvāmin apprehends that if a woman is allowed to take a share in the dāya, she would become independent.[2] The classical passage of Manu that a woman is protected by father, husband or sons read together with the dictum that women cannot hold property (adhanāḥ) forms

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1. 6,5,8,2 striyo nirindriyā adāyādīr.../ Śat.Br. 4,4,2,13, and Maitrāyaṇī-saṃ. 4,6,4, are to the same effect. Cp. Rau, 42. Jha, HLS, II, 470. See Derrett, ZVR, 64 (1962) 15, at 30 for an account of the disputes whether women can have a proprietary right as such. In denials of proprietary right to women the argument that women themselves were a kind of property was never completely forgotten in practice and in judicial theory. Derrett, ubi cit., and p.99 for further details.
2. On Baudh. 2,2,3,45 [135]; cit. by Rege, 51. Baudh's text is as follows (2,2,3,45-7): na strī svātantryaṃ vindate //45//...pitā rakṣati kaumāre bhartā rakṣati yauvane/ putras-tu sthāvire bhāve na strī svātantryam arhatīti// 46// nirindriyā hyadāyāśca striyā matā iti śrutiḥ//47// śl.46 is identical with the often-quoted śl.9,3 of Manu: See also Kane, HDh, III, 605f, on the topic of the shares of women at partition, and below,

the high-water mark of the law of the patriarchal family.[1] In the Dharmaśāstras the denial that a woman could own property was early modified by the admission of the institution of strīdhana, which was in fact originally confined to personal assets of the wife kept separately from the property of the agnates, and maintenance. The right to inherit and to a share was, however, of slow growth,[2] and once it was admitted the question was not whether a woman could own property, but whether she had aśvātantrya, an unrestricted power of disposition.

The institution of strīdhana existed much earlier than Manu. In fact we learn that as early as the time of the Vinaya Piṭaka women could hold substantial wealth, though the property was apparently separate from the property of the agnatic members of the family. In the story of Sudinna whose parents attempt to dissuade him from joining the Buddhist Sangha, Sudinna, the only son and 'heir', is tempted to stay in the family with the prospect that he will

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1. Manu 9,3; 8,416. For a 'modern' Indian interpretation of the motives and purpose of the Manu-smṛti in respect to the rights and social position of women, see R.M.Das, Women in Manu and his Seven Commentators, esp. ch.III.
2. Sen-Gupta, 183ff., 192ff., for the rights of the sonless widow and the daughter. See below, 120ff., 123ff.. For the relationship of the Dharmaśāstra with the Law of the Kandyans, see Derrett, Univ. of Ceylon Rev., 14(1956) 105 at 127ff.

inherit a substantial amount of property. The wealth, consisting of gold and coins, is displayed before Sudinna in three heaps which represent the wife's property or dowry (māttumattikam itthikāya ittidhanam) and the paternal and grandpaternal property (aññaṃ pettikaṃ aññaṃ pitāmaham).[1] But a woman could not inherit the property descended in the male line at the death of her husband, as the story of Sudinna shows.

(2) Maintenance

In the patrilineal and patriarchal family the corrollary of exclusion from a share or the whole of the deceased husband's estate was the right to maintenance and this right takes concrete shape in the Arthaśāstra, being conceived as an endowment which forms together with ornaments the woman's property: "Maintenance (vṛtti) and ornaments (ābhandyam) constitute a woman's property (strīdhana). Maintenance is an endowment (sthāpya) of a maximum of two thousand [paṇas]; as to ornaments there is

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1. III, 16f. Apart from the fact that women could hold property we find one of the earliest distinctions between grandpaternal and paternal property, which as we know, was to play an important role in the Yājñavalkya-smṛti (2,121) and elsewhere.

no limit".[1] This endowment obviously stems from the property of the husband's agnates and is designed to allow a widow[2] to enjoy it living separately from those agnates. This right, however, did not amount to a right to a share. Kātyāyana's passage on the subject is ambiguous in so far as we do not know whether a woman receives up to 2,000 paṇas in excess of immoveable property or whether immoveable property is excluded. Perhaps both interpretations proved useful in practice.[3] Bṛhaspati had conceded the widow a share of land instead of money.[4] In another Smṛti-text, attributed to Vyāsa, we find that the endowment which is given to the widow is characterised as dāya: "But the dāya of a dead man to be given to a woman is limited to 2,000 (or [v.l.]: 2,000 paṇas); and whatever property was given

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1. 3,2,14-15 [98; tr.228]. For the history of this rule in the Dharmaśāstras see J.D.M. Derrett, "A Strange Rule of Smṛti, and a Suggested Solution", JRAS, (1958) 17-25. The standard phrase for 'maintenance' in śāstric texts is grāsacchādana; though it means 'food and clothing' or 'bare subsistence' it may in fact allow a woman to save substantial property of her own.
2. We are not discussing here the effects of remarriage, divorce, and polygamy contemplated in the Arthaśāstra.
3. Kāty. 902: pitṛ-mātṛ-pati-bhrātṛ-jñātibhiḥ strīdhanaṃ striyai/ yathā-śaktyā dvi-sāhasrād dātavyam sthāvarād ṛte// Kane translates sthāvarād ṛte as "except immoveable property"; see śl. 902. But "over and above the landed property" is more logical. See J.D.M. Derrett, JRAS, (1958) at 21.
4. 26,28 [200]: dadyād dhanaṃ ca paryāptaṃ kṣetrāṃśaṃ vā yad-icchati//.

to her by her husband she may retain at her pleasure".[1]

Kane remarks on this passage that Vyāsa seems to represent a middle stage in the evolution of the right of the widow to succeed to her deceased husband.[2] But the question remains whether Vyāsa referred to an undivided family or whether the widow succeeds to the divided husband's share up to the extent of 2,000 paṇas and is allowed to retain the gift from her husband. Perhaps the passage may apply to a state of affairs where the son had been allocated a share and the widow is allowed to remain in the possession of her husband's property to the extent necessary for her maintenance and was thus permitted to reside separately from her father-in-law and brother-in-law etc. In this connection we may refer to a provision in the Arthaśāstra according to which the widow is allowed to enjoy the pati-dāya provided 'she leads a pious life'.[3] Here pati-dāya can hardly mean 'gifts from the husband' which the widow forfeits on her remarriage, as this amounts to a tautology, because śvaśura- and pati-dattam, gifts

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1. Vyāsa, cit. e.g. in Kṛtya-kal., 684; Dk.K. 1460a: dvi-sāhasra-paṇo dāyaḥ striyai deyo mṛtasya tu/ yac-ca bhartrā dhanaṃ dattaṃ sa yathā-kāmaṃ āpnuyat// Tr. by J.D.M. Derrett, JRAS, (1958) at 21.
2. HDh, I, 237.
3. 3,2,26 [99; tr. 229]: pati-dāyaṃ vindamānā jīyeta/26/ dharam-kāmā bhuñjīta/27/

from her father-in-law and husband, had just been mentioned as property to be forfeited in the case of remarriage.[1] It is implicit in the Arthaśāstra that during the lifetime of the father, the sons may found their own households, though separation of status may not take place.[2] The widow could presumably stay in possession of her husband's estate or assets subject to a life-estate.

Thus we find that a widow is provided with maintenance up to two thousand paṇas from the dāya of the agnates, or that she may utilise for her maintenance the dāya of her husband which may well mean the share that had been an advancement to the deceased husband. In the Mahābhārata this suggestion seems to be visualised. First the text of Vyāsa occurs providing that a widow should get dāya up to 2,000: it is followed by the following injunction: "For women their husband's dāya is 'remembered' to be only enjoyed. Women shall in no case spend their husband's property".[3]

In the Kātyāyana-smṛti the term bhartṛ-dāya is used which is understood by some of the commentators as referring

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1. 3,2,23 [99; tr.229]: śvaśura-prātilomyene vā niviṣṭa śvaśura-pati-dattaṃ jīyeta/23/.
2. Cp. 3,5,15 and 21.
3. Ma.Bh.13,47,23-22; Dh.K.1429b]: strīṇāṁ tu pati-dāyādyan-upabhoga-phalaṃ smṛtam/ nāpahāraṃ strīyaḥ kuryuḥ pati-dāyāt kathañcana//.

to a gift of a husband.[1] However, the passage is often quoted in connection with another śloka and may thus be understood differently. The text is as follows: bhartṛ-dāyaṃ mṛte patyau vinyaset strī yatheṣṭataḥ/ vidyamāne tu saṃrakṣet kṣapayet tat-kule'nyathā// aputrā śayanaṃ bhartuḥ pālayantī gurau sthitā/ bhuñjīta-maraṇāt kṣāntā dāyādā urdhvam-āpnuyuḥ//[2] An approximate translation would be: "On the death of her husband the widow should use the property of her husband at her pleasure, but during his lifetime she should protect it. Or she should spend it on the (husband's) family [or: she may pass her days in her husband's family]. The sonless (widow), faithful to her husband's bed, and living with the senior elder (of the family, i.e. the father-in-law), shall patiently enjoy (the husband's dāya) till her death; after her the heirs (dāyādas) shall receive it".

According to Kātyāyana when the husband dies undivided the widow is entitled to food and raiment or she may get a share in property (dhanāṃśam) which she may retain till her death. But Kātyāyana also puts some limitation on the right of enjoyment by stressing that the widow has to serve her elders, otherwise she would be confined to food and raiment (922-3).

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1. See Kane's tr. of śl. 907 and fn.
2. Dh.K. 1456a.

(3) Strīdhana

In early texts strīdhana consisted only of ornaments and personal utensils of the woman, though Āpastamba notices the view of other authors, who had recognised jñāti-dhanam as an additional category of strīdhana with which the wife was presumably provided among some communities by her blood relations in the family of her marriage.[1] Manu enumerates six kinds of strīdhana which he calls the 'sixfold strīdhana' (ṣaḍ-vidhaṃ strīdhanaṃ). It consists of: (a) property given before the marriage fire (adhyagni); (b) what is given at the time of the bride's departure on the bridal procession (adhyāvāhanikaṃ); (c) what is given out of affection (prīti-dattaṃ); (d) what is given by her brother, mother or father (bhrātṛ-mātṛ-pitṛ-prāptaṃ).[2] To this Manu adds in the next śloka 'gifts which are made subsequent to marriage' (anvādheya) and 'gifts made by the affectionate husband' (yad-dattaṃ patyau prītena).[3]

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1. 2,14,9 [242; Dh.K, 1415b]: alaṅkāro bhāryāyā jñāti-dhanaṃ cetyeke//9// Baudhāyana 2,2,3,44 [134; Dh.K. 1427a] speaks of ornaments of the mother given at the time of the marriage which after the wife's death go to the daughters. Vasiṣṭha 17,46 [51; Dh.K. 1427b] speaks of marriage presents [or: 'utensils', 'paraphernalia'], which the daughters shall divide: mātuḥ pāriṇeyam [v.l. pāriṇāyyaṃ] striyo vibhajeran/ Already the Taittirīya-saṃ. (6,2,1,1) states that in respect of pariṇāhya the wife is master: patnī hi pāriṇahyasyeśe / Nearly identical with Maitrayaṇī-saṃ. (3,7,9) and Kaṭh.-saṃ.

2. 9, 194.
3. 9, 195.

Many of the commentators argue or assume that the expression ṣaḍ-vidhaṃ strīdhanaṃ in Manu's text only purports to give an illustration, i.e. that there could not be a smaller number of types of strīdhana and that the text does not preclude a larger number! But it seems difficult to agree that the use of the phrase ṣaḍ-vidhaṃ strīdhanaṃ was not deliberate. Strīdhana, according to the actual intention of the author, may have been exclusively the property over which a woman could freely dispose whereas in respect of the categories of property added by Manu in 9,195 or any other acquisitions her power was restricted. Perhaps the commentator Sarvajñanārāyaṇa preserves the true intention of the author when he says that mātṛka riktha refers to property other than strīdhana[1] and when he further explains that "the difference between what is strīdhana and what is not strīdhana, is that in regard to the former she is free to give it away or otherwise dispose of it, while in regard to the latter she is not to do all this".[2] Nandana declares

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1. On Manu 9,192; SBE, XXV, 370 fn.192. The Kṛtya-kal. seems to make a distinction between mātṛka riktha and strīdhana and subsumes the categories mentioned in Manu 9,195 under mātṛka riktha for purposes of succession, i.e. it was not to go to the daughters preferentially, but equally to uterine sons and daughters. Kṛtya-kal., 688. Rangaswami's Introduction to the Vyavahārakāṇḍa of Kṛtya-kal., 98.
2. Manvartha-vivṛtti [Mandlik's ed. 1215; Dh.K. 1439a]: viśeṣaṣ tu strīdhanāstrīdhanayoḥ strīdhane dānādi-svāmyaṃ striyā na tvanyetreti/.

that anything obtained besides these six categories of strīdhana is not strīdhana, but becomes only the husband's property.[1]

There is no conclusive evidence on the question what Manu means by mātṛka riktha and how far it can be distinguished from the 'sixfold strīdhana'. We may conjecture that the mātṛka riktha refers to some kind of property which is due to the wives of a polygamous husband. In respect of mātṛka riktha, if it is a gift which is made subsequent to marriage (anvādheya) or a gift made by the husband (yad-dattaṃ patyau prītena) the power of disposition of the wife is probably limited, and it goes to her children after her death. If what is given consists of a provision of maintenance from the husband's dāya, or from the dāya of the agnates, she has no right to dispose of it freely and it will be divided by uterine sons and daughters after husband and wife are deceased.

It appears from the text of other Smṛtis that many categories of property which a woman could call her own, could not be subsumed under the sixfold pattern of strīdhana suggested in the Manu-smṛti, and that by the term strīdhana all kinds of property of a woman were generally understood,

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1. Rege, 62, 63fn.1. On 9,194 [Mandlik's ed., 1215]: ṣaḍ-vidhāt strīdhanād anyat-striyā yal-labdhaṃ bhartṛ-dhanam eva na tu strīdhanam ity-abhiprāyaḥ//

though a woman may not have the right freely to dispose of them.[1]

The text of Yājñavalkya on the topic enumerates first four kinds of strīdhana and in the following śloka three other categories are mentioned. To the first four kinds he adds 'ādyam' ('et cetera'), according to the most popular reading, whereas another version reads 'eva' ('only') -- a discrepancy which exactly represents the two contrary views of śāstric medieval writers, one side tending to increase the number of categories of strīdhana, and the other tending to limit them.[2] The majority of medieval writers, mainly from the South, tend to utilise the first reading of Yājñavalkya's text, whereas the commentators on the Manu-smṛti would restrict the number of types of strīdhana in any case. The authors from Bengal led by

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1. That 'strīdhana' was not necessarily identical with free power of disposition is already implicit in the Arthaśāstra.
2. Yājñ. 2,143-144 [25 of.; Dh.K. 1443a]: pitṛ-mātṛ-pati-bhrātṛ-dattam adhyagny-upāgatam/ ādhivedānikādyaṃ [v.l. -vedanikaṃ caiva] ca strīdhanaṃ parikīrtitam //143// bandhu-dattaṃ tathā śulkam-anvādheyakam eva/...//144//- "What is given by the father, mother, husband and brother, what is given before the nuptial fire, what is given on account of supersession etc. is [or: is only] declared to be strīdhana, also what has been given by relatives, śulka (bride-price) and gifts received after marriage". See also Viṣṇu 17,18.

Jīmūtavāhana follow the second restrictive reading.[1] This may be due to the fact that in the North and Bengal the patrilineal-patriarchal family continued to dominate the law and women were accordingly always confined to maintenance whereas the categories of property which she could dispose of freely - strīdhana strictly speaking - remained limited.

Kātyāyana gives the most comprehensive list of strīdhana and with the aim to dispel doubts as to which categories a woman could freely dispose of, includes a cross-division of all categories into saudāyika and non-saudāyika.[2] Saudāyika is defined as that property which is obtained by a married woman or by a maiden in her husband's or father's house from her brother or from her parents[3] and women are held to have (or desired to have) svātantryam in respect to it, even if it consists of immoveables.[4]

(4) Rights of a Mother or Widowed Mother.

The rights of the mother were protected according to some texts in so far as the property is not to be divided by

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1. Rege, 65. The Kṛtya-kal. had apparently no use for the passage and omitted it.
2. Kāty. 894-914; Rege, 71.
3. Śl. 901: uḍhayā kanyayā vāpi bhartuḥ pitṛ-gṛhe'pi vā/ bhrātuḥ [v.l. Kṛtya-kal., 684; Dāyabhāga, 76: bhartuḥ] sakāśāt-pitror vā labdhaṃ saudāyikaṃ smṛtam//
4. Śl. 905.

the sons until her death. Thus Śaṅkha-Likhita tells us that the property should not be divided, if the father is alive and unwilling, the sons being asvatantra. It is added that this postponement of partition applies similarly to the mother if she is alive.[1] A similar provision is made in the Manu-smṛti and it seems that during her lifetime the mother could remain in control of the possessions of her late husband[2], which is natural when there exist nuclear families in which the widow would manage, the sons still being minors,[3] the power of managing possibly passing to the eldest brother when the widow's years advanced and she became unable to manage the household affairs.[4] After the death of the father, however, an adult son would preferably be the manager of the property and when there were only minor sons the father's brother would be the next preferable manager in patrilineal families in case the brothers had not separated. But if there was no father's brother or when the father had separated from his collaterals and had founded his own household, there was nothing in the Dharmaśāstras which would expressly prevent the mother's

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1. See above, 34. Dh.K.1147. avasthitāyām may also mean 'if the mother stays with them' or 'is righteous in conduct'.
2. 9,104.
3. Cp. Jātaka 4,1.
4. Which was likely to happen in the case of an aged father. See Jātaka 5,326; Jātaka 1,226; 237; 3,56; 300. Śaṅkha-Likhita, ubi cit.

being the manager of her minor's sons' joint estate. Especially amongst communities where the nuclear family prevailed, the mother must have been allowed to manage and protect the estate if there were only minor sons, in spite of the normal śāstric attitude which favoured the protection of the widow by agnatic elders and made it possible for the husband to reunite with his agnates shortly before his death. Kātyāyana mentions brother, paternal uncle, and mother as able to incur debts for the purpose of the kuṭumba which will be binding on the separating 'heirs' (rikthibhiḥ). The sequence brother, paternal uncle, and mother seems to represent an order of preference according to which a person could become manager.[1]

(5) Mother's Right to a Share

According to the Yājñavalkya-smṛti sons could, if they wished, divide the property, provided they gave the mother a share equal to that of a son.[2] Vyāsa extends this

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1. Śl. 846. Nārada 4,3[46], cited above, 33 According to Aparārka, who wrote in the 12th c., the sons are not free (asvatantra) as long as the mother 'is able to maintain the household', but this does not apparently prevent adult sons from leaving at the time of the marriage, 719; for the text see below, 222. Cp. Yājñ. I, 63 where the following order of the guardians in marriage is given: father, father's father, brother, sakulya, mother.
2. Yājñ, 2,123b; Nārada 13, 12b[192]; cp. Viṣṇu 18, 34 where mothers are said to receive a share on par with sons.

rule to sonless step-mothers, and grand-mothers.[1] Whether this share of a mother amounts only to a provision for maintenance forms the subject of a protracted struggle in the commentatorial literature.[2]

(6) The Right of the Sonless Widow to Inherit her Husband's Estate.

We have already discussed the rights of a widow as a member of a family living jointly or as a widow of a member of a family but having been advanced and living separately. An extant text of Bṛhaspati has a very involved rule on the subject. This Smṛti-author argues strongly in favour of the right of the sonless widow to succeed to her husband's moveable and immoveable property invoking the theory that with the widow half of her husband survives.[3] Bṛhaspati seems to reflect the individual enjoyment of property by a couple with the ensuing right of the sonless widow to enjoy the husband's property, moveable as well as immoveable. He combats the view that if the husband's kinsmen (kulya, sakulya), besides his father, his mother and uterine brothers are alive, the widow should not receive her husband's property. (26, 94). The family Bṛhaspati

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1. Dh.K. 1414a. See Kane, HDh, III, 605-6. See also Devala. Dh.K. 1414b, and Kāty. 851.
2. Derrett, ZVR, 64 (1962) at 59.
3. 26,92-95 [211]; 26,97 [212].

contemplates is probably a patrilineal kula which has close ties with the mother's family. The reference to the mother and the uterine brothers and the direction that the widow should spend the money on her husband's sister's son (which could in South Indian and some other customs be her brother's son), seems to suggest this.[1] Any claims of both families, agnates as well as cognates, in the property are repelled with threat of punishment by the king,[2] which similarly indicates that there was a close association in the property-sphere between the two families unlike in the large patriarchal and patrilineal, exogamous family.

These passages do not disclose whether a husband dying divided from his agnates is meant, though in another passage a divided husband is spoken of, whose property the widow (jāyā) inherits, with exception of the immoveables.[3] In another śloka the widow of a divided person is likewise excluded though she may opt for food (piṇḍa) or a portion of arable land.[4]

The whole subject was obviously heavily disputed and subject to custom which varied among different families, communities and from locality to locality. Yājñavalkya in

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1. 26, 98[212].
2. 26,104[213]. See also 26,87[210]; also ascribed to Kāty. 927.
3. 26,98[212].
4. 26,100a [213]; 103.

his order of heirs typically restrains himself from offering involved rules on the topic of the succession by the widow to a sonless husband.[1] According to him the widow ranks first before daughters, parents, brothers, their sons, sagotra, bandhu, disciple, fellow-students. But the questions whether the widow succeeds to an undivided or only to a divided husband, whether she takes his immoveable property or only moveable property, whether she takes it subject to restrictions, and whether she has to fulfil certain conditions (chastity or niyoga) is left open to local custom. This rule could be declared by Yājñavalkya as applicable to all castes (...sarva-varṇeṣv ayaṃ vidhiḥ/, because the customs among patriarchal families would tend to jointness of agnates (effected sometimes by reunion) which would consequently amount to the exclusion of widows and their confining to maintenance. Kātyāyana tackles the problem in the case of families where the brothers were thought to hold the property in a kind of severally until partition. The widow is admitted to the share in the undivided property, but it is subject to restriction on the power of disposition and the property would lapse to the heirs of the husband after her death.[2]

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1. 2,135-136. Viṣṇu 17, 4-3.
2. Käty. śl. 921-925.

II. The Position of the Daughter.

In the patrilineal family based on pure agnatic kinship ties, the daughter had hardly any rights in the property of her agnates apart from maintenance and the marriage expenses including the dowry[1] which amounted according to some authors to 1/4 of the share of the son.[2] The girl would normally go to her husband's house and become for all purposes a member of her husband's patrilineal family and gotra.

The earliest mention of the daughter as an heir occurs in the Āpastamba-dharmasūtra and in the Arthaśāstra.[3] In the Arthaśāstra the daughters 'born in lawful marriages' are apparently mentioned as alternative heirs in the absence of sons.[4] The Arthaśāstra seems to make a distinction between duhitṛ and kanyā, the former already married at the time of the death of her father or having reached the marriageable age, and the latter still to be married by their brothers who have to pay the dowry prādānikam out of the parental estate.[5] The distinction is not maintained in the later

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1. Arthaś. 3,5,21 [104]:... kanyābhyaśca prādānikam/ Āpastamba 2,14,9 (jñati-dhanaṃ cetyeke). See above,
2. The divergent views are discussed by Kane, HDh, III, 619f. For the sister's share see below,
3. For the stages of the evolution of the daughter's right see also Sen-Gupta, 191ff.
4. 3,5,10[104]: rikthaṃ putravataḥ putrā duhitaro vā dharmiṣṭheṣu vivāheṣu jātāḥ/ Note that 3,6,8[105] makes the sisters adāyādas.
5. 3,5,21[104]:... kanyābhyaśca prādānikam/.

Smṛtis; Devala seems to give a paraphrase on this situation in the Arthaśāstra when he says: "To the daughters should be given that much of the father's (estate) as would be required for their dowry. If a man dies sonless, his property shall be taken by his legitimate daughters of the same caste as himself in the same way as a son".[1] Āpastamba contemplates the daughter as an optional heir in the absence of sapiṇḍas, or perhaps with sapiṇḍas.[2] It seems doubtful whether in communities where the patrilineal and patriarchal family prevailed the daughter was more than a medium to prolong the line and ultimately to present her father with a daughter's son and whether the text of Āpastamba and the Arthaśāstra would make the daughter a full owner of the inherited estate. The Arthaśāstra e.g. mentions the putrikā-putra, the daughter's son as a substitute son after the aurasa.[3] The daughter was probably first admitted as an heir in the śāstric system through the institution of the 'son-in-law in the house' which would especially occur where a person has established his own household detached from his agnates and which was especially admissible among communities where the son was not of such

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1. Cit. in the Kṛtya-kal., 670: Kanyābhyaśca pitṛ-dravyaṃ deyaṃ vaivāhikaṃ vasu/ aputrakasya kanyā svā [svaṃ] dharma-jā putra-vaddharet//.
2. 2,6,14,4 [241]. Kane, HDh, III, 714.
3. 3,7,4-5; the daughter as such is not mentioned, though putrikā-putra could mean a daughter treated as a son.

spiritual and material importance as in the pure patrilineal system. Here a son may be preferred though a daughter was not unwelcome, and in the absence of a son a marriage (to adopt is a well-known phrase of Sinhalese origin) in binna would take place.[1] The Manu-smṛti invokes the identity of the father with the son and the identity of the son with the daughter in order to advocate the daughter's right to the father's estate,[2] though the daughter (putrikā) had to be 'appointed' and the daughter's son was to take eventually the estate of the maternal grandfather.[3] The statement that between son's son and the son of an appointed daughter no difference exists in respect to secular matters and religious duties shows that the institution was mainly viewed as a device to continue the family by male progeny.[4] But the following passage shows that a daughter could be appointed even if there was a chance of a son's being borne to the father and that a son born after appointment would share equally with the appointed daughter.

A son of an appointed daughter could take the estate of his own father, offering funeral cakes to his maternal grandfather as well as to his own father.[5] These passages

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1. On the relation between śāstric and customary law, see Derrett, Univ. of Ceylon Rev., 14(1956) at 111f. Also in Contr. to Ind. Soc., 6(1962) at 24f.
2. Manu 9,130; Bṛh. 26,126[127].
3. Manu 9, 127; 132.
4. Manu 9, 133; see also 9, 139: there is no difference between a son's son and daughter's son.
5. 9,132.

indicate that a daughter's son or son's son and the continuation of the line were not always the only object, but that the daughter's marriage might have been valuable as it created a relationship with the daughter's husband. The husband, who, if he was contemplated as having property of his own, could not have been always the indigent 'ghar-jamāī' of inferior status he is normally taken to be today, had a definite claim on the property of the wife which derived from the father, in case the daughter died sonless.[1]

A step towards the heirship of the daughter was that mere intention sufficed to make a daughter a son (putrikā), though most of the texts nevertheless mention only the putrikā-putra, the daughter's son as a substitute son.[2]

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1. 9,135. Among communities where the agnatic kinship ties were not so strong and uxorilocal marriages were not unusual, the position of the son-in-law was higher. The so-called illatom- "adoption" in Andhra is related to the features referred to by Manu. A son-in-law does not lose his right in his own family, and he is excluded by an aurasa son born after marriage. The son-in-law is treated and acts as a son. He can perform śrāddha, if a special ceremony is undergone by him, which does not confer on him the right to succeed, though if there is no son of the father-in-law, nor a son of the marriage, he succeeds. After the ceremony the illatom loses his rights in his natural family. See Sorg, Avis du Comité consultatif de jurisprudence indienne, 233-40. Derrett, Univ. of Ceyl. Rev., 14 (1956) 105 at 112f.

2. putrikā-putra may, as we have said, mean 'daughter treated as a son' and the ambivalence of the term may have proved useful.

The daughter as such is recognised as an heir after the widow according to Yājñavalkya,[1] though he does not mention whether she had to be appointed or not, or whether she was to be unmarried or not. The daughter's son or son of the appointed daughter does not appear in the list of heirs, but he is listed second amongst the secondary sons and the right of the daughter as an heir after the widow can be understood subject to the eventual right of inheritance of the putrikā-putra. We may suggest that the Yājñavalkya-smṛti purposely leaves the question open and leaves the question whether the daughter as such could inherit and if so subject to what qualifications to be resolved by customs prevalent amongst different communities and families. In the patrilineal family which tends to perpetuate itself exclusively by male descendants, the daughter had to be unmarried, that is, she should not have passed into a different family. Here a son-in-law in the house was a secondary device to bridge the gap created by the absence of a son. The daughter would be a guardian for her sons and be allowed to retain the property for them. In other communities which did not adhere so rigidly to a patrilineal family pattern and where daughters and sons might leave the family at marriage to form individual

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1. 2, 136; Viṣṇu-dh.sū. 17, 4-6.

households, even the married daughter, who might even be married to the father's sister's son in some communities, might be considered as a possible heir.

Kātyāyana says that a daughter had to be unmarried to be an heir; this indicates that he thinks of the patrilineal family, where a married daughter would rarely be contemplated as a medium to continue the line.[1]

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1. Śl. 926.

CHAPTER IV

RULES ON PARTITION AND REUNION

CUSTOMARY LAW AND ITS REFLECTION IN THE DHARMAŚĀSTRAS

I. Partition between Father and Sons.

(1) Time of Partition.

We may first give a brief summary of the main provisions in the Dharmaśāstras relating to the time and the circumstances in which the property (dāya or riktha) of a person could be divided.

In the early Dharmaśāstras covering a period when it was still common to retire to the forest in old age, it may have been advisable for the aged father to divide the property before his death or retirement and to divide the property equally, as this would reduce the possibilities of quarrels amongst the brothers. This seems to be intended by the rule given by Āpastamba, which translated literally, is as follows: "[Still] living the father shall divide the dāya equally among his sons, excluding the impotent, the insane and the outcast".[1] Besides this rule a considerable number of passages inculcate the father's authority as regards the time of partition strengthening thereby his authority in the patriarchal family. Sons who question the

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1. 2,6,14,1 [233; Dh.K. 1164a]: jīvan putrebhyo dāyaṃ vibhajet samaṃ klībam-unmathaṃ patitaṃ ca parihāpya//

father's independence in this respect faced, as we have seen (above, 38f.) social ostracism. The father's permission was an essential prerequisite for a partition initiated by the sons.[1] In the patriarchal household the property was normally to be divided only after the death of the father.[2] Here the paternal property and the maternal property tend to be separate and this is reflected in the text of Nārada which came to be normally quoted by medieval authors: "After the death of the father the sons shall divide their father's property; and the daughters shall divide the mother's property; if the daughters are not alive, then their offspring".[3] The absolute authority of the father as regards the time of partition is emphasized by the principle that sons can have no ownership as long as the father is alive or that they are in any case not independent (asvatantrāḥ).[4]

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1. Baudh.-dh.sū. 2,3,8[128; Dh.K.1146b]: pitur anumatyā dāya-vibhāga sati pitari/ Cp. Śaṅkha-Likhita-dh.sū. [Dh.K.1148b]: jīvati pitare riktha-vibhāgo'numataḥ- "If the father is alive, there is partition with his consent".
2. Gaut. 28,1[436; Dh.K. 1144b]: ūrdhvaṃ pituḥ putrā rikthaṃ vibhajeran/ Devala, cit. e.g. in the Dā.bhā, [13; 28; Dh.K.1156a]: pitary-uparate putrā vibhajeyur dhanaṃ pituḥ/ asvāmyaṃ hi bhaved eṣāṁ nirdoṣe pitari sthite//.
3. Nār. 16,2[186; Dh.K. 1152; 1449a]: pitary-ūrdhvaṃ gate putrā vibhajeyur dhanaṃ pituḥ [v.l. vibhajeram dhanaṃ kramāt]/ mātur duhitaro'bhāve duhitṛṇāṁ tad anvayaḥ//
4. Manu 8, 146; See Devala cit. above, 2nd fn. Śaṅkha-Likhita, cit. above, 54 fn. asvatantrāḥ pitṛ-mantaḥ/

To the strict rule that the property should be divided after the death of the father or with his consent there are exceptions in certain texts which consider a partition possible when there is no obvious need to reside jointly because the mother has passed the child-bearing age, the daughters are given in marriage and the father has lost the interest in worldly affairs.[1] Exceptional circumstances allow partition of the father's property irrespective of his permission, namely when he has become an outcaste, has turned a mendicant, suffers from disease etc., according to Nārada,[2] or on account of other faults of the father which Devala leaves apparently to be determined by local usage.[3] Another series of passages embodies the view that the property of the father should not be partitioned during the lifetime of the mother and we have referred before to the text of the Manu-smṛti where it is said that after the death of the father and mother the property should be divided. This may refer to cases where the sons had been advanced with property and have founded individual households. The mother would be in possession of her husband's property

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1. Nār. 16,3 [189; Dh.K. 1152b]: mātur-vivṛtte rajasi prattāsu bhaginīṣu ca/ nivṛtte vā'pi ramaṇe pitary-uparate'spṛhe dāya-vibhāga syāt. Cp. Bṛh. 26,9[196; Dh.K.1155a].
2. Cit. previous fn., v.l.: vinaṣṭe vāpy-aśaraṇe.
3. Cit. above, 130 fn. 2 : nirdoṣe.

until after her death when the property would be equally divided amongst the brothers.[1]

(2) Method of Distribution of Property.

(i) Discretionary Power of Father.

Passages of the Brāhmaṇa-texts show that the father had in principle the power to consider the individual needs of any of the sons,[2] the obedience shown by a son or services rendered,[3] but that he may also think of providing the sons with property according to seniority, equally, or by giving the youngest a larger share.[4] The same latitude

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1. Manu 9,104; cit. above,
See also Yājñ. 2,117[222; Dh.K. 1141b]: vibhajeran-sutāh pitror-ūrdhvaṃ rikthaṃ-ṛṇaṃ samam.
2. Jaiminīya-br. 2,183 : yas tvāva putrāṇāṁ kṛpaṇatamo ('poorest') bhavati, sa pitur hṛdayam āpyeti/. Cit by Rau, 46, fn.1.
3. śuśrūṣuḥ putrāṇāṁ hṛdyatamaḥ/ Taittirīya-br. 2,3,11,4 [ ]; Rau, ubi cit.
4. Kāṭhaka-saṃ. 1,8,4. Rau, ubi cit. Tensions between the eldest son and the father have always been experienced in India as well and for the aging father the youngest son might be the main support. The eldest son would often leave at marriage. Cp. the Parable of the Prodigal Son.

in the power of distribution of property is supported in Smṛti-passages, as by Nārada who says: "If the sons have been divided by the father himself either equally or unequally, that division shall be legal for them; as the father is indeed the prabhu ("master", "boss", "all-powerful") in respect of everything".[1]

But the father's power was subject to the injunction not to debar any of the sons from a share without reason, which would arise e.g. when the son was excommunicated or suffered from certain physical or mental diseases.[2] Even in the family which adhered to strict patriarchal notions as far as the father's power of alienating and dividing the property was concerned, the father was not "all-powerful" if he suffered from certain personal faults which would endanger the just distribution of the property. Thus Nārada tells us: "If the father is deceased, or angered, or with his mind addicted to sense objects, or prone to act unlawfully, he cannot be the sole authority in

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1. 16,15 [193; Dh.K. 1172a]: pitraiva tu vibhaktā ye samanyūnādhikair-dhanaiḥ/ teṣāṁ sa eva dharmaḥ syāt sarvasya hi pitā prabhuḥ// Cp. the passage from the Bṛh.-smṛti (26,15[197]) which is to the same effect with the addition that the sons, if they act adversely to the father's disposition, are threatened with punishment (vineyās te syur anyathā); this according to a different reading (patitāḥ syur anyathā; Dāyabhāga, 53) means that they are liable to excommunication.
2. Arthaś. 3,5,16-17; and 20 [104; tr.242]. Kāty. 843 essentially reproduces Arthaś. On exclusion from the right to take a share, see below,

the matter of partition".[1]

(ii) Preferential Share of the Eldest Son.

In respect to the eldest son the patriarchal power of the father at a partition was most likely to be curtailed. The dependency of the father on the eldest son probably accounts for the preferential share due to such a son and its assignment might have been originally motivated by the desire to assure the eldest son's loyal support to the father and to reward his efforts in managing the property as the de-facto head of the family, when the father was incapacitated due to old age.[2] Another aspect of the preferential share of the eldest son was that the eldest son was after the father's death and before partition took place between the brothers, and even after partition, the representative of the family in the socio-religious sphere. The share provided the reason for the performance of religious duties of the first-born son. Kauṭilya refers to the method of partition which is recommended by a certain author Uśanas. This author, according to him, gives as the reason for the preferential share the eldest son's duty to

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1. Nār. 16,16 [194]: vyādhitaḥ kupitaś caiva viṣayāsakta-mānasaḥ/ anyathāśāstra-kārī ca na vibhāge pitā prabhuḥ// Jha's tr. HLS, II, 168.
2. See Śaṅkha-Likhita, cited above, 133 34

make offerings to the ancestors.[1] Another passage, attributed to Uśanas and cited e.g. in the Aparārka, may have some relation to the view attributed by Kauṭalya to Uśanas, and provides that even if the heirs of a deceased person are divided in wealth, certain śrāddhas including the sixteen śrāddhas must be performed by one alone.[2] This would normally be the eldest brother. According to Hārīta the ancestral home and the image of the deity of the family is inter alia allotted to the eldest at a partition, whereas the other sons have to build separate houses or huts. Alternatively the sons may stay in the house the best part of it being assigned to the eldest.[3] The position of the eldest son is not only charged with socio-religious privileges and duties but may also involve - according to Nārada - the payment of the father's debts, though the other sons may have received portions of the estate. Thus

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1. Arthaś. 3,6,3-5 [105]: catus-padābhave ratna-varjānāṁ daśānāṁ bhāgaṃ dravyāṇāṁ ekaṃ jyeṣṭo haret/3/ pratimukta-svadhā-paśo hi bhavati/4/ ity-auśanaso-vibhāgaḥ/5/.
2. Cit. by Kane, HDh, IV, 521 and fn. 1167. For the various types of śrāddhas see ibid., ch.X.
3. Hārīta quot. in Vi.-ra. [473; Dh.K. 1183b]: vibhajiṣyamāṇe gavāṁ samūhe vṛṣabham eka-dhanaṃ variṣṭhaṃ vā jeṣṭhāya dadyur devatā-gṛhaṃ ca, itare niṣkramya kuryuḥ ekasminneva dakṣinaṃ jyeṣṭhāyānupūrvyam itareṣām/

the reason for preferential share may also sometimes be attributed to the duty of the eldest son to pay the father's debts.[1] Seniority alone does not always justify preferential treatment and other qualifications may be additionally necessary according to Bṛhaspati. He says: "One who is senior on account of birth, learning and other qualifications should receive two shares out of the dāya; the others should be equal sharers; the former is like a father to these".[2] The suggestion that the assignment of the preferential share is dependent on special qualifications and virtues is interpreted by some medieval commentators to mean that a brother can be assigned the preferential share and be regarded as 'senior' if he distinguishes himself by special qualities.[3]

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1. Nār. 4,2,[46]: pitary-uparate putrā ṛṇaṃ dadyur yathāṃśataḥ/ vibhaktā vā'vibhaktā vā ye vā tām udvahed dhuram/- "On the death of the father, the sons whether divided or undivided, shall pay his debt in proportion to their shares; or it may be paid by that son who bears the burden (or who bears the place of honour amongst the brothers)". The payment by all sons in proportion to their shares was, however, the normal method.
2. Bṛh. 26,21 [198]: janma-vidyā-gunair-jyeṣṭho dvyaṃśaṃ dāyād avāpnuyāt/samāṃśa-bhāginas tvanye teṣāṁ pitṛ-samas tu saḥ//
3. See Jha, HLS, II, 375 for comments by medieval authors on the passage of Bṛhaspati. Lakṣmīdhara, an early medieval writer, on Manu 9,112-114 notes: gunavaj jyeṣṭhādi-viṣayaścāyam uddhāraḥ/(Kṛtyakal. , 656f.) This indicates the decay of the custom of preferential shares.

(iii) Advancement of Sons by Shares.

The possibility that sons leave their parental home at marriage, receiving a share of the property in advance, is visualized in the early Dharmasūtras and we find that for this purpose specific items or proportions are laid down. Often, as we have seen, the eldest son would leave the family at marriage. Āpastamba refers to a custom according to which certain items of the property are to be handed over to the eldest son whereas other items are to be taken by the father, the mother being allowed to retain her property, consisting of ornaments and gifts from her relations. Other sons besides the eldest are not mentioned, which could mean that the younger son or sons would stay at home receiving on the death of the father the property which was still in the possession of the father.[1] Āpastamba disapproves of this method of partition, but admits - by referring to the text of the Taittirīya-sam. - that an eldest son could be dismissed by setting him up in life with wealth.[2] The scheme contemplated by Āpastamba is

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1. Āp. 2,14, 7-11 [241; Dh.K. 1165b, 1166a; 1415b]: deśaviśeṣe suvarṇaṃ kṛṣṇā gāvaḥ kṛṣṇaṃ bhaumaṃ jyeṣṭhasya/7/ rathaḥ pituḥ paribhāṇḍaṃ ca gṛhe/8/ alaṅkāro bhāryāyāḥ jñāti-dhanaṃ cetyeke/9/ tac-chāstrair-vipratiṣiddham/10/.
2. 2,14,12 [242; Dh.K. 1166a]: athāpi tasmāj jyesthaṃ putraṃ dhanena niravasāyantīty-eka-vac-chrūyate//.

probably the following: The father could settle the eldest son in life, staying perhaps with younger sons, but normally the father (2,14,1) should divide the property equally when he is old, assigning a share to the eldest as a sort of gratification (2,13,12; see below, 141 fn.1) and recognition of his support and his position as the eldest. Śaṅkha-Likhita would add to the share of the eldest a bull and expressly assigns the house to the youngest with special reservation for the father's residence, in case, as we may add, he had not left the house to become a wandering mendicant or forest hermit, but has joined the vṛddhāśrama that is, he spends the rest of his days under the protection of his son.[1] Vasiṣṭha only knows of partition between brothers (atha bhrātṛṇāṁ dāya-vibhāgaḥ). Vasiṣṭha probably implies that the father is already deceased or has retired from worldly affairs. Again the youngest son is assigned the house inter alia, whereas presumably the other sons are deemed to have left earlier having taken some share in the property in advance to establish their own household, which may be in the neighbourhood of the house of the father, and are now joining together to divide the bulk of the property of the father: "Then follows the partition of dāya among brothers;

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1. Cit. in Kṛtya-kal. [654; Dh.K. 1166b]: vṛṣabho jyeṣṭhāya/ gṛhaṃ yavīyase/ anyatra pitur-avasthānāt//

if there are any childless women they shall receive a share till they get a son; the eldest shall take two shares and of cows and horses, one tenth; goats and other animals and the house shall go to the youngest; and articles of iron and household requisites go to the middle-most".[1]

A very illuminating text by Hārīta indicates the choice of possibilities which a father had when his sons were grown up. The father may, it is suggested by Hārīta, betake himself to the forest or join the vṛddhāśrama, that is, live under his son. The third alternative - corresponding more aptly to the postpastoral settled condition reflected by the Dharmasūtras - is that the father could advance the sons with minor portions of the property and live with the rest of the property in his own house. We also come to know that the property advanced as well as the property retained by the father continued to form the means of subsistence for father and sons; "Or, while still living, the father shall divide the sons, and betake himself to the forest, or he may enter the final stage; or dividing a small portion,

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Ad fn.1: The widow, i.e. the wife of a deceased collateral receives a share "in trust" for a son who might be born. If a daughter is born the share reverts to the collaterals. Other commentators enjoin the postponement of partition, if there are signs of pregnancy. See Jha, HLS, 341 ---- by commentators as women who are pregnant at the time of partition.

if there are any childless women they shall receive a share till they get a son; the eldest shall take two shares and of cows and horses, one tenth; goats and other animals and the house shall go to the youngest; and articles of iron and household requisites go to the middle-most".[1]

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1. Vas. 17, 40-45 [50; Dh.K. 1184a, 1407a: atha bhrātṛṇāṁ dāya-vibhāgaḥ//40// yāścānpatyās tāsām ā putra-lābhāt// 41// dvyaṃśaṃ jyeṣṭho haret//42// gavāśvasya cānudaśamaṃ /43// ajāvayo gṛhaṃ ca kaniṣṭhasya//44// kārṣṇāyasaṃ guhopakaraṇāni ca madhyamasya//45// "Childless women" is explained by commentators as women who are pregnant at the time of partition.

he may recover the property from them (the sons). He may [or:must] give a portion to the indigent son".[1]

Whereas this indicates that mutual adjustments in respect of property between father and son were still contemplated at this early stage, it must have been desirable for a wealthy father to be free from further claims by sons who had left their father's house at marriage and had set up their own house-fire. The advancement to the son became a definitive portion of the estate which was worked out between father and sons. This would especially happen when further issue might be expected, who were then entitled to receive the share of the father including accretions, after the father's death.[2]

The Smṛtis tend to simplify the rules by not referring to specific items of the estate, as the Dharmasūtras did, and they speak only of preferential, unequal and equal shares, which are, once they are assigned, in the exclusive possession of the sharer. Some Smṛtis enjoin[3]

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1. Tr. follows Jha's tr. HLS, II, 142. Cit. in Kṛtya-kal., 653, [Dh.K. 1163a]: jīvan-neva vā putrān pravibhajya vanam-āśrayed vṛddhāśramaṃ vā gacchet/ svalpena vā saṃvibhajya [or: vibhajya] bhūyiṣṭam ādāya vaset/ yady-upadaśyet punas tebhyo gṛhṇiyāt/kṣīṇāṃśca vibhajet/.
2. See below,
3. Nār. 16,12 [162; Dh.K. 1171a;]: Bṛh. 26,16 [198; Dh.K. 1172a].

that the father should take two shares at a partition, which refers obviously to a situation where sons have been definitively allocated portions from the estate and where father and sons enjoy their shares separately from each other, and at least as far as sons are concerned further mutual claims are excluded during the lifetime of the father and after his death, if a son was conceived and born after partition.

(iv) Equality of Shares.

(a) Preferential Share of the Eldest Son versus Equality of Shares.

The preference of the eldest son at a partition or as the sole heir is already questioned by Āpastamba who advocated equal partition by the father. The preferential share for the eldest son, consisting of an article of value, serves in his view merely as kind of compensation: "Having satisfied the eldest son by the gift of a valuable article, the father during his lifetime, shall divide the dāya equally..."[1] Āpastamba refers to the view of other authors who advocated primogeniture (jyeṣṭho dāyāda ityeke) and to the custom practised 'in certain countries' where unequal division was practised (see above, 131) and repudiates

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1. 2,13,12; 2,14,1 [232f; Dh.K. 1164]: eka-dhanena jyeṣṭhaṃ toṣayitvā//12// jīvan putrebhyo dāyaṃ vibhajet samam... //1// toṣayitvā (from root tuṣ, caus, toṣayati) means 'having satisfied, pleased, gratified'.

these possibilities with a śruti-text which according to him suggests that all sons participate equally at a partition of dāya.[1] In a passage of Manu we find that equality of shares is based on equality of skill of the sons in their occupation by which especially Vedic learning is meant. If this is the case, the special share of the eldest is confined to a small part of the property which serves as an expression of respect towards the eldest brother.[2] One function of the property inherited from the father is to serve the prestige and the tradition of the kula and normally the eldest son inherits the personality and the religious duties of the father. This, as we have seen is one of the reasons for the preferential share. However, if the property is earned by the common labour of the brothers while pursuing agricultural or commercial occupations there would be no basis for the preferential share and the property so acquired is divided equally.[3] Equality of shares would thus occur especially in agricultural and commercial

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1. 2,14, 1 of. [242f.]: tac-chastrair-vipratiṣiddham//10// Manuḥ putrebhyo dāyaṃ vyabhajad-ity-aviśeṣeṇa śrūyate// 11// See above,
2. Manu 9, 115.
3. Manu 9, 205 [402]: avidyānāṁ tu sarveṣām-īhātaś ced-dhanaṃ bhavet/ samas-tatra vibhāgaḥ syād apitrya iti dhāraṇā// Bühler (SBE, XXV, 374) translates: "But if all of them being unlearned, acquired property by their labour, the division of that shall be equal, (as it is) not property acquired by the father".

communities where the common efforts of the brothers would not entitle the individual brother to have a special claim on the property on account of Vedic learning. Amongst Śūdras who were engaged in agriculture and commercial activities it was not customary to have preferential shares.[1]

(b) Distinction between Ancestral (grandpaternal) property and property of the father.

In the early Dharmasūtras, in the Arthaśāstra, and in some of the Smṛtis the father is contemplated as the sole owner of all property whether acquired by inheritance or acquired by him personally. The Nārada-smṛti for instance, which was composed according to MM P.V.Kane nearly at the same time as the Yājñavalkya-smṛti or later[2] did not differentiate between the 'self-acquired' property of the father and property deriving from the grandfather.[3] The rules in

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1. Manu 9, 157.
2. HDh, I, 202f.
3. But see the text attributed to Nārada, but not found in the edn. publ. by Jolly: maṇi-mukta-pravāḷāṇāṁ sarvaryaiva pitā prabhuḥ/ sthāvarasya tu sarvasya na pitā na pitāmahaḥ// pitṛ-prasādād bhujyante vastrāṇyābharaṇani ca/ sthāvaraṃ tu na bhujyeta prasāde sati paitṛke//-
"The father is the prabhu of all such articles as jewels, pearls and corals, but of all immoveable property neither the father nor the grandfather. Clothes and ornaments are enjoyed as loving gifts from the father; but immoveable property cannot be enjoyed as a gift from the father". Dh.K. 1219b Yājñavalkya,Kāty., and Viṣṇu to whom the text is also attributed.

the dāyabhāga chapter of Nārada visualise a patriarchal family which is held together by subjection to the will of the father.[1] Other features of patriarchal, patrilineal family in the Nārada-smṛti are also the exclusion of the widow from inheritance, and the absence of cognates (bandhus) as heirs who in the Yājñavalkya-smṛti rank after the gotrajas (2,136). In the Yājñavalkya-smṛti we find an ambivalent position. The father is first given the liberty of dividing the property according to his wish, by giving a preferential share to the eldest, or by dividing the property equally.[2] An unequal division would be just, provided, as we may add, the father did not act arbitrarily, e.g. exclude one son completely without justifying reason.[3] This rule can obviously refer to the latitude of the power of a father in strict patriarchal families where dāya was not subdivided into "self-acquired" and "ancestral and grandpaternal" property for purposes of partition and alienation.

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1. Sons should divide the property only after the death of the father (according to one reading with preferential shares: kramāt, i.e. according to order. See preface to Jolly's ed., I3.
2. Yājñ. 2, 114.
3. Yājñ. 2,116b [221; Dh.K. 1169b]: nyūnādhika-vibhaktānāṁ dharmyaḥ pitṛ-kṛtaḥ smṛtaḥ//.

This rule seems to be contradicted to some extent by the subsequent §l. 121 where sons are said to have a coextensive right with the father in ancestral land, nibandhas and dravya.[1] The Yājñavalkya-smṛti does not tell us explicitly that the ancestral property has to be divided equally amongst sons. The Viṣṇu -smṛti, a late work, asserts that the father should divide the ancestral property equally, whereas he may divide the self-acquired property at his discretion.[2] Already in the Manu-smṛti we are incidentally informed of reservations for sons in respect to ancestral property, when it is said that the father need not divide the ancestral property recovered by him; this implies that the father had to divide ancestral property as such.[3] In a patriarchal family the father might not choose to divide the property at all, and the sons' rights in any property would accrue to them only after the father's death. The only consequence of the rule of Yājñavalkya would be then that if the father choose to divide he was in consonance with Dharmaśāstra if he divided the ancestral property

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1. On the meaning of these terms see above, 97.
2. 17, 1-2 [46; Dh.K. 1175a]: pitā cet putrān vibhajet tasya svecchā svayam-upārjite'rthe//1// paitāmaha tvarthe pitṛ-putrasyos-tulyaṃ svāmitvam/2/.
3. Manu 9, 209 [403; 1213b]: paitṛkaṃ tu pitā dravyam-anvāptaṃ yad āpnuyāt/ na tat putrair bhajet sārdham akāmaḥ svayam-arjitam//.

equally. There would have been nothing wrong if the father had even alienated his whole property beyond what was necessary for the maintenance of the family.[1] The right to take an equal share of the ancestral property at a partition has been attributed to the growing importance of land as a fund for maintenance of the descendants.[2] But a number of texts suggest that a different concept of the family made itself felt in the Dharmaśāstras. The passages of Manu and Viṣṇu can be interpreted to refer to a family where the father tends to be rather the manager than a patriarch. A passage by Bṛhaspati strengthens this impression that the coextensive ownership of father and son amounted in effect to a restriction on the father's power of alienation in respect of ancestral property whereas in respect to self-acquired property there was no such restriction. In the recovered ancestral property besides his self-acquisitions on account of learning or valour, the father is said to have ownership and free power of disposition. This property the sons are to receive in equal shares only on his death.[3] This would suggest that as regards ancestral

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1. See Yājñ. 2, 175, cit.above, 99.
2. Sen-Gupta,
3. Bṛh. 26,58 [205; 1221b]: paitāmahaṃ hṛtaṃ pitrā sva-śaktyā yad-upārjitam/ vidyā-śauryādinā prāptaṃ tatra svāmya pituḥ smṛtam// pradānaṃ svecchayā kuryād bhogaṃ caiva tato dhanāt/ tad-abhāve tanayāḥ samāṃśāḥ parikīrtitāḥ//.

property there were restrictions on the father's power of alienation, and we have seen that another passage by Bṛhaspati refers to the consent of jñātis as necessary for the alienation of ancestral property.[1] It seems doubtful whether we can follow N.C. Sen-Gupta and assume a right of the sons to ask for a partition of the ancestral property from the following text of Bṛhaspati: "In ancestral house and land, the father and sons (v.l.: sons and grandsons) have equal shares. In the father's property the sons are not entitled to a share, if the father is unwilling (to give)".[2] The text seems to imply merely that if the father divides the property, he should divide the property deriving from ancestors equally among sons and grandsons, whereas as regards his own property he could retain it completely and it would be divisible at his death in equal shares. One might be inclined to see a right of partition in a variant reading of the passage of the Viṣṇu-smṛti referred to above, which however, is cited only by Aparāditya: "If the father divides his sons, he may do what he likes in regard to his self-acquired property; in regard to the property acquired by the father's father the sons also sometimes effect a

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1. See above, 101.
2. Sen-Gupta, 205, 210. Bṛh. 26, 10 [197]: kramāgate gṛha-kṣetre pitā putrāḥ samāṃśinaḥ/ paitṛke na vibhāgārhāḥ sutāḥ pitur-anicchayā// See Vyavahāra-mayūkha, 95, below,

partition".[1] One hesitates to assume a right to partition for the Smṛti-period on the basis of such slender evidence, beyond the instances which are listed in the Smṛtis, according to which a partition against the will of the father is not contemplated except for special, limited reasons.[2]

The realisation of the share in the ancestral property during the lifetime of the father may not be expected to be based so much on the Dharmaśāstra where the patriarchal family prevailed as the guiding principle, but may be found in customary law. We have already referred to the family where the father was rather a manager than an absolute head and owner of all property. Here at marriage all or some of the sons would leave the house of their parents taking a share of the ancestral land which they owned then separately from their father. This differs from the background implied by the texts of the Dharmasūtras, because the Dharmasūtras (as we have seen) contemplated only advancements in respect of moveables. The necessity for providing sons with a share in the ancestral property was also a matter of prestige and some communities who normally followed the patriarchal pattern may have relented

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1. Aparārka, 718: pitā cet-putrān vibhajet tasya svecchā svayam-upārjite'rthe pitrar-jite'pi dhane kadācit-putrā eva vibhāga-kartāro bhavanti/.
2. See above, 131

to the extent of allowing sons to receive equal shares from the ancestral property at their respective marriages. This conjecture enables us to account both for the two distinct strands of tradition preserved in more or less co-eval texts, and for the customs and "schools of law" of which we have adequate evidence later.

II. Partition between Collaterals.

(1) Mode of Partition.

(a) Preferential Share.

The preferential position of the eldest son or brother has been noted above. The preferential shares for sons born of different mothers are determined by Manu according to priority of birth in cases where the mothers are of equal caste.[1] But it is also stated that in case the younger son is born of the senior wife and the elder one of the junior wife, both sons take preferential shares, the child of the senior marriage taking the better of these: whereas the eldest son, born of the senior wife, having both qualifications, is entitled to a larger preferential share than was suggested in the other situation.[2] These conflicting

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1. Manu 9, 125; Bṛhaspati 26,11 [197; Dh.K. 1237b]. According to the Arthaśāstra priority of birth is decisive only in the absence of a son born of a wife of a marriage performed with ceremonies and a son of a mother which was married while a virgin. Arthaś. 3,6,13.

2. Manu 9, 122-4.

views have been differently explained by commentators, Lakṣmīdhara e.g. taking the view that the son born of the senior wife is senior and entitled to a preferential share.[1] The view that seniority is based on the seniority of the mother may presumably be based on the fact that the first wife was normally the one who would assist the husband in religious ceremonies and was the wife who was married in an 'approved' form so that her son seemed to be more qualified to inherit a preferential share. The view that seniority depends on the time of birth would be based on practical considerations (prevalent in customary law) of the first-born son being the most suitable to represent the family in secular matters as well as religious matters.[2] A text of Devala would even suggest that the requirement of equal caste of the mothers as a condition for the seniority of the son could be discarded.[3] In a monogamous household the

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1. Kṛtykal., 658; interpr. according to Caṇḍeśvara, cit. ibid. See Kṛtyakal., Introd., 92f.
2. Cp. Sarvajñānārāyaṇa and Nandana on Manu 9, 126. 25SBE 351 fn. 125.
3. Cit. in Vi.ci., 199 (Dh.K. 1194a): bahir-varṇeṣu cāritryād-yamayoḥ pūrva-janmanaḥ/ yasya jātasya yamayoḥ paśyanti prathamaṃ mukhaṃ/ santānaḥ pitaraś-caiva tasmin jaiṣṭhyaṃ pratiṣṭhitam// The Vi.ci. remarks that if a son of a wife belonging to the same caste as the husband is born subsequently, then this son is senior though born later.

preferential share was normally received by the first-born brother.[1] There are, however, many texts which show that after the death of the father equal partition took place.[2]

(b) Joint Acquisitions.

If brothers acquired property jointly during the lifetime of the father, the property so acquired belonged to the father, if the sons were not yet divided by him. But the father was enjoined to distribute such property equally amongst them.[3] Any acquisitions after the death of the father would be equally divided.[4]

(2) Females' Rights at Partition.

Charges on the Estate.

Before we discuss the charges on the estate we should be reminded of the females' rights at partition to which we referred in the preceding chapter.[5] At a partition the brothers have to pay off the debts of the father,[6] and likewise debts incurred by a brother, paternal uncle, or

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1. Manu 9, 112-5. See above, 134.
2. Yājñ. 2,118. Manu 9, 104; See texts cit. by Jha, HLS, II, 339. On the question of uddhāras see below, 211ff.
3. Manu 9, 215.
4. Yājñ. 2,120a [226; Dh.K. 1192a]: Bṛh. 26, 18[198; Dh.K. 1222a].
5. 111f.
6. Arthaś. 3,5,22 [104; tr. 243], cp. Manu 9, 218; Kāty. 850. Kane, HDh, III, 621.

mother for purposes of the family.[1] The paternal estate is also encumbered with costs of the performance of the sacramental rites of brothers and sisters (saṃskāras - marriage being the most important saṃskāra for sisters and the upananayana, if not the marriage, for the unmarried brothers.[2]

Generally speaking the members of the family who were not entitled to a share had a right to maintenance. Thus there was the duty to provide maintenance for the sonless widows of brothers according to authors who have not conceded the right of the brother's widow to inherit her husband's estate.[3] The concubine (avaruddha strī) and her

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1. Manu 8, 166; Kāty. 846.
2. Yājñ. 2, 124; sisters receive 1/4 of a share of a son for the performance of their marriage. See Manu 9, 18 (cp. 9, 130; 139); Viṣṇu 18, 35; Bṛhaspati 26,23 [199; Dh.K. 1421b: Kātyāyana]; Kāty. 858; Vyāsa [Dh.K.1422a]; Devala [Dh.K., ibid.] The marriage of the younger unmarried brothers is included for this purpose according to the Arthaś. 3,5,21 [104]. Above, 42 fn.2. Nārada's text 16, 33-4 [198f] and also Yājñ. refer to saṃskāras of brothers and it is not clear whether the marriage expenses of brothers are also to be defrayed out of the common estate. Commentators are divided on the question, the possibility that a brother might ask for marriage expenses and subsequently not think of marriage perhaps playing a rôle. See Kane, HDh, III, 619-21.
3. Nārada, cit. in Sm.ca. [292; Dk.K. 1401b]: yāḥ patnyo vidhavāḥ sādhvyo jyeṣṭhena śvaśureṇa vā/ gotrajenāpi dhānyena bhartavyaś-chādanāśanaiḥ//- "Those widows who are chaste should be maintained with food and clothing by the eldest brother-in-law or the father-in-law or by any other sagotra". Tr. Jha, HLS, II, 475.

issue were entitled to maintenance out of the property with the exception of the special rights of the dāsiputra (son of a female slave) of Śūdras who had a right to a share at the choice of the father; and after the father's death the brothers had to give him half of a share due to a legitimate son (aurasa).[1] An important category of dependants are the persons disqualified from a share on account of psychical or physical disability.[2] Finally we have to mention two more charges on the paternal estate, namely a gift for religious purposes which was promised by the father before the death,[3] and gifts promised by the father as a token of affection.[4]

III. Partition of Property, Severance of Status and Reunion.

(1) Partition between Father and Son(s) and Severance of Status.

In the parlance of Anglo-Hindu law and Modern Hindu law severance of status means that jointness has ceased and the shares have come into existence notionally and once actual shares are given in satisfaction of the right to a

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1. On dāsiputras see Kane, HDh, III, 600ff. Derrett, JAOS, 81 (1961) 251-61 at p.255. On concubines see Kane, ibid., 811ff.
2. Manu 9, 201-3. Yājñ. 2, 140-2; Gaut. 28, 43-5; Baudh.2, 38-41; Viṣṇu 15, 32-5; etc. Sons of disqualified persons, if free from such defects, are entitled to a share. Kane, HDh., III, 617f.
3. Kāty. 566.
4. Kāty. 848.

share and in working out the severance of status, a partition by metes and bounds has taken place. The ancient text of Hārīta (above, 139) has shown us that the sons may be 'advanced' which is not followed by a severance of status between father and son, so that the property advanced to the son and the property retained by the father were still subject to the respective needs of father and son. Though the ideal time for partition is when further sons are unlikely to be procreated, the Smṛtis also provide that the father could partition the property amongst the sons and separate them in status from himself in a situation where further issue could be expected to be born. Such issue would then exclude the divided sons from inheriting the father's share: "If a son is born after partition, he shall receive the property of the father alone; or, if any other sons had been reunited, he shall share it with them".[1] That the son was separate after partition may also be inferred from the rule of reunion which is given by Bṛhaspati.[2] Such a partition would exclude further mutual claims and loan transactions would be possible between father and

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1. Manu 9, 216 [Dh.K. 1563a]: ūrdhvaṃ vibhāgaj-jātas-tu pitryam eva hared dhanam/ saṃsṛṣṭās tena vā ye syur vibhajeta sa taiḥ saha// Tr. Jha, HLS, II, 347. Nārada 13, 43 [201] is identical.
2. 26, 113 [295].

separated son;[1] in short, it would amount to partition as understood in Anglo-Hindu law. This is an advance from the position in the Arthaśāstra where debts mutually contracted by father and son are irrecoverable[2] On the other hand the concept embedded in the Manu-smṛti that he who engages in disputes with the father is not to be invited at the śrāddha-ceremonies (3,159) and the idea expressed by Bṛhaspati that there could be no valid vyavahāra between father and son,[3] constituted a rule of socio-legal propriety which would cut at times across the concept of independent ownership of the son.

We may also raise the question whether a son would not be liable for any debts contracted by the father after separation, as presumably the duty to pay debts after the death of the father still exists in such an extreme case where the father dies separated from all sons, without leaving property. Putratva- the state of being a son - makes it incumbent on the son to settle the debts as a personal obligation.[4] A text of Kātyāyana places the burden

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1. Yājñ. 2,52.
2. 3,11,21 [113; tr. 263].
3. Bṛh. 1,124 [21]: guroḥ śiṣye pituḥ-putre dampatyo svāmī-bhṛtyayoḥ virodhe'pi mithas-teṣāṁ vyavahāro na siddhyati// See Sen-Gupta, 231.
4. The Smṛtis need not expressly deal with this question; the Bṛhaspati-smṛti says (above, 78) that a son should pay first his father's debts and then his own, from which follows that the pious obligation operates even after ~~partition.~~ the death of the father ~~die~~ whether the father divided or undivided from his son.

to pay the father's debts on that son, who actually takes the wealth, i.e. the son who takes on default of an undivided son,[1] and if we follow the Vīramitrodaya, this text implies that the separated son (which includes the separated grandson) has to pay the post-partition debts out of his own wealth even if he inherits no property from the father.[2]

The special relationship between father and son may also have been the reason that the extant passages of the Dharmaśūtras and most of the Smṛtis with exception of the Bṛhaspati-smṛti (see below, 161) do not deal with the question of reunion between father and son, but with reunion between collaterals. There are also no rules on evidence of partition between father and son as in the case of brothers (see below, 159).

The rule of Manu sakṛd-aṃśo nipatati... sakṛt-sakṛt does stress that a father should normally not rescind a partition, though presumably the father would still have claims on the property of the son when the father's property

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1. śl. 559; Jha, HLS, I, 206.
2. 266; Dh.K. 710a; see also Parā.mā. III, 264. But see Sm.ca., 395; where it is said in effect that the divided sons do not pay when the father dies joint with some sons, since by partition the sons have lost their right to succeed. See below,

had become exhausted.[1]

Against the notion that a father has any right beyond maintenance in the property of a son after partition, we may refer again to the rule of reunion between father and son given by Bṛhaspati (below, 161), which shows that the father could transfer the ownership of a portion of the estate, the size of the portion being laid down in the Smṛtis.[2] The provision which enjoins that a father has to divide the ancestral (grandpaternal) property equally, whereas in respect to his self-acquired property the father is free in the method of partition, is indicative of separate ownership between father and son. We may make note of the careful provision in the Bṛhaspati-smṛti which says that as regards ancestral property recovered by the father and certain items self-acquired by him 'the father's ownership

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1. Manu 9, 47 [372; Dh.K. 1072b]. "Once a share has fallen to a person [or: descended to a person]... this happens only once". The text may also purport to admonish, as other smṛtis do, collaterals not to question the partition done by the father. The fact that none of the commentators would commit himself by referring to a separation of status between father and son in this connection, could be interpreted as showing that partition between father and son was sui generis and would not necessarily involve finality. Bṛh.26, 140 and 149 [220f.; Dh.K.1584; 1585a] are also usually taken by commentators to relate to a partition between collaterals.
2. See also Gautama cited above, p.68 , who says that one can be owner on account of samvibhāga.

has been declared'.[1] This rule would be pointless if, after partition has taken place in accordance with it, the father was still intended to have svāmya in the son's share.

In addition we have the special rule of Manu and Yājñavalkya which envisages a brother receiving at a partition a small portion of the estate if on account of ability in his profession he does not desire his regular share in the property of the father. He thus renounces his rights in the property. This indicates that the receipt of even this symbolic share brings further mutual claims to an end.[2] The text of Yājñavalkya on the same topic does not tell us that this refers only to a partition between brothers after the death of the father and it is justifiable to understand it to apply to a partition between father and son where mutual claims between father and sons and their descendants cease. The use of the term pṛthag = 'separate' in the rule points to complete separation.[3]

To be added to p.158:

Thus we find that for practical purposes partition and separation of status between father and son are ~~is~~ envisaged in the śāstra. But the special relationship between father and son makes such partition dissimilar from that between collaterals in so far as mutual adjustments may take place after the property is divided and as even a divided son may remain under an obligation to pay the debts of the father after the latter's death irrespective of inherited property. Moreover a separated son inherits in preference of his ~~the~~ widowed mother.

has been declared'.[1] This rule would be pointless if, after partition has taken place in accordance with it, the father was still intended to have svāmya in the son's share.

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1. Bṛhaspati 26,58-9 [205; Dh.K. 1221b, 1222a]: paitāmahaṃ hṛtaṃ pitrā svaśaktyā yad-upārjitam/ vidyā-śauryādinā prāptaṃ tatra svāmyaṃ pituḥ smṛtam// pradānaṃ svecchayā kuryād bhogaṃ caiva tato dhanāt/ tad abhāve tu tanayaḥ samāṃśāḥ parikīrtitāḥ//
2. Manu 9, 207 bhrātṛṇāṃ yas tu neheta dhanaṃ śaktaḥ sva-karmaṇā/ sa nirbhājyaḥ svakād aṃśāt kiñcid dattvopajīvanaṃ//.
3. Yājñ. 2, 116a [221; 1169a]: śaktasyānīhamānasya kiñcid dattvā pṛthak kriyā/.

(2) Partition between Collaterals and Severance of Status.

Most of the disputes over property would arise between brothers and other agnatic collaterals and the rules in the Dharmaśāstras purport to establish the finality of partition and to prevent recurring claims of the agnatic collaterals. Unlike in the case of father and son where partition involving separation of status was not expressly envisaged because of the special relationship of father and son, there was a distinct tendency towards partition of property as well as separation of status. The Nārada-smṛti and the Bṛhaspati-smṛti have comprehensive rules on the evidence of partition and separation of brothers which could be inferred if e.g. their giving and receiving loans, property, cooking, religious acts, income and expenditure were separate, and mutual commercial transactions between the brothers took place. Only as regards the observation of rules on impurity due to death and birth and the offering of water libations they are still concerned with each other, according to Bṛhaspati.[1] The evolution of the rights of the individual against the strong proprietary claims of agnatic collaterals is not only evident from the elaborate rules on

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1. Nārada 16, 38-40 [200; Dh.K. 1580a]; Bṛh. 26,147 [221; Dh.K. 1581b]: pṛthag-āvyaya-dhanāḥ [v.l.: vyayādhānaṃ = mortgages] kusīdaṃ ca parasparam/ vaṇik-pathaṃ ca ye kuryur-vibhaktās-te na saṃśayaḥ//= The rule on impurity and water libations is usually cited in connection with the rule on the son born after partition. 26,56 [204; 1568a].

partition, evidence of partition, and reunion, but appears also from the persistence of rules which gave to the collaterals rights of control over land even after partition. The fact that these rules have been preserved by medieval authors shows their continued relevance, and the commentators had to find arguments to discredit the prima facie meaning of these texts. A most frequently cited text runs: "Divided or undivided, all sapindas are equal in respect to immoveable property. No individual among them has power to give away, or mortgage or sell it".[1] In practice the rule amounted mainly to a right of preemption for relatives.[2]

In the pre-legal era and in the early period of the Dharmaśāstras we find that reunion between brothers tended to be simply a question of living again together with one's brothers or agnates of the kula.[3] Unless one was outcaste, which involved disinherison, there was an implicit right to rejoin the agnates which must have been felt at some stage as a handicap for the individual enjoyment of property,

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1. vibhaktā avibhaktā [avibhaktā vibhaktā] vā dāyādaḥ [v.l. sapiṇḍāh] sthāvare samāḥ/ eko hyanīśaḥ sarvatra dānādhamana-vikraye//, Kāty. 854 [Aparārka,757]; Manu [Mit., Setlur's ed., 612] and Bṛhaspati 14,8 [Kṛtyakal., 376].
2. On the rules of preemption in the dharmaśāstra see J.D.M. Derrett, Adyar Libr. Bull., 25(1961) 13-27; Univ. of Ceyl. Rev., 19(1961) 105-116.
3. Cp. Arthaś. 3,5,9, [108; tr.241]: ... bhrātaraḥ sahajīvino... Devala: avibhakta-vibhaktānāṁ kulyānāṁ vasatāṁ saha/ See above, 29.

especially if the rejoining agnate would claim a share at a second partition. It is in this context that the proposition of Bṛhaspati must be read, namely that once dāya is divided, a reunion between dāyādas is possible only as a matter of affection, that is to say, reunion became contractual: "If one, who has been divided, lives again through affection with his father or brother or with his uncle, he is said to be reunited".[1] The parties participating at a reunion are according to Bṛhaspati limited to a pattern of three generations who may normally be alive at a time and who lived in a joint household before it broke up. Partition would e.g. take place between father and sons and reunion between father and one or some of the sons, or reunion between some of the sons, or there may be a partition between father, sons and a son of a predeceased son and there may be a reunion between uncle and nephew.

In the patriarchal family, based on agnatic kinship ties and the offering of piṇḍas to three deceased ancestors, it often occurred that the brothers would divide only after the father's death, so that before partition has taken

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1. Bṛh. 26,113 [215; Dh.K. 1556a]: vibhakto yaḥ punaḥ pitrā-bhrātrā caikatra saṃsthitaḥ/ pitṛvyeṇāthavā prītyā tat-saṃsṛṣṭaḥ sa ucyate// Reunion between brothers: Bṛh. 26,103 [214]. Medieval authors stress that there should be agreement.

place a great-grandson of the original owner might be living. Here within a patter of four generations counted from the original owner, the agnates had a right to redistribute the property after they had resumed joint living.[1]

(3) Mātṛ-bhāga or Patnī-bhāga.

(Partition according to Mothers or Wives) and Reunion. The Right of a Widow of a Reunited Brother.

Many of the rules on reunion reflect a preceding partition according to mothers.[2] Whereas this method of

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1. Devala, as cit. e.g. in Kṛtya-kal., 663: Avibhakta-vibhaktānāṁ kulyānāṁ vasatāṁ saha/ bhūyo dāya-vibhāgaḥ syād-a-caturthād iti sthitiḥ//- See above, 29. for tr. The text does not suggest that agreement was essential for reunion and seems to refer - historically - to a situation where one (or some) of the agnates within four generations has left the kula taking possibly a share in advance and rejoins his agnates for joint living.
2. Derrett, Univ. of Ceyl. Rev. 14(1956) 105ff., 131 and fns. 163, 165-6. Kane, HDh, III, 607. Partition according to mothers is noted by Bṛh. 26,24,25a [199; Dh.K.1237b] who wants to apply the rule when each mother is of equal caste and has an equal number of sons and says that when the number of sons varies a partition according to males has been recommended; Vyāsa Dh.K. 1238a, and Vṛddha-Hārīta Dh.K. 1988a. Gaut. would assign to the eldest uterine brother of each group a preferential share. 28,17 [441; Dh.K. 1234a]: prati-mātṛ vā sva-sva-varge bhāga-viśeṣaḥ/ Patnī-bhāga occurred in South India in modern times and must have been a widespread custom though the śāstric system eventually prefers putra-bhāga. The Sa.vi. says that patnī-bhāga is practised amongst Vaiśyas and Śudras. Foulke's ed., para.79. The custom occurred in Negapatam. J. Mossel, Heathen Laws among the Wellales and Chittys on the Coast of Coromandel I.O. Mack. Coll. Ch.XIV, 10(f), [original at Mack.Pr.$$.11, [pp.471-511)] at fol. 90b. Cp.Viśvarūpa a Southerner (Derrett, 1965 Ker.L.T. 36), who refers to partition

continued:

partition may have been of convenience in a polygamous family and may have merely prevented discord in such families, another object of the rules on reunion was to prevent the share of a reunited brother from reverting after his death to the reunited non-uterine (half) brother.[1] The share was to go to a uterine brother though unreunited.[2] We may venture the conjecture that the function of the rules on reunion are partly to assure the maintenance of the mother which would be rather incumbent on her own sons than on her stepsons. The rules may also reflect a residual

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according to mothers preceding reunion. On Yājñ.2,138 [Dh.K. 1546a,b; 1547a] In Punjab customary law the institution is known as chundavand and exists side by side with the putra-bhāga rule, called pagvand ('per turban'). Rattigan, A Digest..., 13th ed., 240ff.

1. Uterine sons might live close to their mother, perhaps in the same compound. The mother might have received land from her relations. If one of the uterine brothers had a joint concern with a non-uterine (half) brother, was reunited, and subsequently died, the unreunited uterine brother(s) would succeed to the land and house, whereas moveable property which was elusive and could be concealed went to the reunited non-uterine brother.
   Prajāpati Dh.K. 156lab: antar-dhanaṃ ca yad-dravyaṃ saṃsṛṣṭānāṁ ca tad-bhavet/ bhūmiṃ gṛhaṃ tv-asaṃsṛṣṭāḥ pragṛhṇīyur-yathāṃśataḥ//

2. Manu 9, 211-2.

interest in the property of the mother's relatives by birth who are interested to see that their daughter or sister who has married into another family and her descendants may prosper rather than the children of another wife who is connected by birth with another family. A text of Bṛhaspati seems to confine the share of a reunited member to relatives who are more closely related to the owner than non-uterine brothers. The text seems to suggest that his share should go to reunited (uterine) members (by survivorship), then to the widow, then to parents, and then to the sister (unmarried or married).[1] This text may be contrasted with the text from the Nārada-smṛti dealing with the same question, though in an atmosphere of a strict patrilineal family. The passage is normally cited by commentators in connection with a reunited brother who dies sonless, though we may note that the text may have been applicable even to a divided and unreunited brother, partition of property not involving separation of status for purposes of the sonless widow's right to inherit her husband's estate: "If among brothers [commonly understood as 'reunited brothers'], anyone without issue should die, or become a wandering mendicant,

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1. Bṛh.26,107-108 [214; Dh.K. 1558a]: kadācid-vā pramīyeta pravrajed-vā kathañcana/ na lupyate tasya bhāgaḥ sodarasya vidhīyate// ya tasya bhaginī sā tu tato'ṃśaṃ labdhum arhati/ anapatyasya dharmo'yam-abhāry āpitṛkasya ca//

the others shall divide his property, exempting the strīdhana. They shall make provision (bharaṇam) for his wives till their death provided they remain faithful to the bed of her husband; should the wives be otherwise, they shall withdraw the provision. If he has left a daughter, her father's share would be meant for her maintenance; till her marriage she shall retain that share; after marriage her husband shall maintain her".[1]

IV. Partible and Impartible Property.

Self acquisitions and Their Exemption at Partition.

In the patriarchal household acquisitions belonged in principle to the head,[2] though acquisition and enjoyment of property with the indulgence of the father, especially when the son had been advanced and founded his own household

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1. Nār.16,25-7 [169; Dh.K.1553b, 1554a]. Tr. follows Jha's, HLS, II, 430.
2. Manu 8,416. Cp. also Śaṅkha-Likhita-dh.sū., cit.e.g. in Kṛtya-kal., 651 [Dh.K. 1148b]: ... na jīvati pitari putrā riktham vibhajeran/ yady-api syāt paścād adhigatam tairanarhā eva putrāḥ/ artha-dharmayor asvātantryāt/- "While the father is alive, the sons shall not divide the property, - even that which may have been acquired by them subsequently (subsequently = after they married?) Hārīta [Dh.K.1146a]: jīvati pitari putrāṇām-arthād ānavisargākṣepesv-asvātantryam/- "While the father is living the sons have no independence in respect to the appropriation, gift or realisation of property". ākṣepa has been interpreted as referring to the disciplinary power over slaves etc. or the realising of debts. See Dh.K., ubi cit.

must always have been possible. Yet the acquisitions of the sons, that is in respect of property which was acquired without recourse to the paternal property, were originally part of the paternal property. When it became recognised that certain items of property acquired by the son, namely vidyā-dhana (gains of learning), śaurya-dhana (acquisition by prowess) and saudāyika (gift by the father), could not be easily claimed from with without disrupting the unity of the family, it became admitted that the acquisition was not compulsorily partible at a partition between father and sons or between brothers after the death or retirement of the father.[1] That early authors only know of the exemption of self-acquisitions at a partition between brothers may be ascribed to the fact that even if sons left the house of the father receiving a share in advance, all property was still - even if in practice only nominally - in principle the property of the father. The institution

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1. Gaut.dh.sū. 28,31 [445; 1205a] ; Vyāsa, Dh.K. 1231a:
vidyā-prāptam śaurya-dhanaṃ yac-ca saudāyikaṃ bhavet/
vibhāga-kāle tat-tasya nānveṣṭavy-am sva-rikthibhiḥ//-
"What is obtained by learning, by military prowess and gifts (by the father), these shall not be sought by one's coheirs at the time of partition". Tr. Sen-Gupta, 216f. Vaśiṣṭha knows of self-acquisitions only in the context of partition between brothers (17,40;51 [50f.; Dh.K. 1205a]), i.e. when a brother acquired property during jointness after the death of the father, he would receive a double share.

of the right to exempt self-acquisitions at a partition was probably admitted in the face of the tensions which may exist between the father and sons and between brothers. It could well have been a device to prevent disunity and premature disruption of the family, and to support the postponement of partition until the father's death. It was a kind of reward or concession for members living jointly and co-operating.

But if the father - in a patriarchal family - decided to separate sons, the exemption of the sons' self-acquisitions would tend to be restricted, because there was no point in rewarding the son, while on the other hand the property acquired by the son was strictly speaking an accretion to the father's property. We hardly find rules on this question, apart from the rule mentioned by Kātyāyana which shows that a father could claim two shares or a half share of the acquisitions of the son.[1] There is no ground for supposing that this text applied only to the son living jointly as has been supposed in modern decisions.[2] Vidyā-dhana, śaurya-dhana and saudāyika are categories of self-acquisitions which are typical for patriarchal families

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1. śl. 851a: dvy-aṃśa-haro'rdha-haro vā putra-vittārjanāt pitā/ Cit. in Dāyabhāga, 49. See fn. to Kane's tr. of śl. 851 for different explanations.
2. Derrett, 69 C.W.N. XXXVII-XXXIX.

pursuing brāhmaṇical or military occupations, whereas gifts by the father illustrate the patriarchal power of the father. While the pre-occupation of some of the Smṛtis with these categories led to specified subdivisions, there were steady accretions of other kinds of self-acquisitions to constitute ultimately a long and detailed list in the Kātyāyana-smṛti.[1] If we compare the history of strīdhana, which has culminated in a similar detailed list in the Kātyāyana-smṛti, we find that there was a strong tendency to keep strīdhana separate from the property of the agnates from the time of acquisition.[2] The concept of self-acquisitions, however, always related to a partition and the property was not separate - e.g. for purposes of succession - until it was exempted at a partition.

A different method besides the mere enumeration of types of self-acquisitions is contemplated in the Manu-smṛti. Though in śl. 906 of ch. 9 vidyādhanam, besides gifts, wedding gifts and madhuparkika[3] are enumerated, in

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1. śl. 867-884.
2. śl. 894-916; but see on the wife's dowry, and the right of the husband to utilise strīdhana in exceptional circumstances,
3. For the meaning of madhuparkika see SBE, XXV, 374 fn.206. Commentators understand it as 'the fee given for the performance of a sacrifice' or 'any present received in token of respect, with the honey-mixture'. For the persons worthy of receiving the honey-mixture, see Manu 3, 119-20.

Śl. 208 it is said that property which has been acquired by one's exertion without detriment to the father's property is not partible amongst brothers.[1]

Until now we have only spoken of self-acquisitions made by the sons which occurred in the patriarchal family, all property belonging to the father. In other texts we find that the claims of sons had crystallized in respect of the ancestral (grandpaternal) estate which they would take in equal proportions together with the father. If the latter wanted to prevent further claims of the sons, he would give at his choice a portion of his self-acquired property, especially when the birth of another son could be expected who would then (together with a reunited son, if any) inherit the father's share in the ancestral property and the rest of the self-acquired property acquired before partition and the property self-acquired after partition.[2]

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1. 403; Dh.K. 1212b, 1213ab: anupaghnan pitṛ-dravyaṃ śrameṇa yad-upārjitam/svayam-īhita-labdhaṃ tan-nākāmo dātum-arhati// Viṣṇu 18, 42 is identical. The Arthaś. already declares property which is acquired by a person and which 'is not brought into being out of the father's property' as impartible. 3,5,3 [104; tr.241]: svayam-ārjitaṃ avibhājyam, any-atra pitṛ-dravyād-utthitebhyaḥ/
2. Bṛh.26,54-6 [204; Dh.K. 1567; 1508a: pitrā saha vibhaktā ye sāpatnā vā sahodaraḥ jaghanyāś-caiva ye teṣāṁ pitṛ-bhāga-harās-tu te// anīśaḥ pūrva-jaḥ pitrye bhrātṛ-bhāge vibhakta-jaḥ// putraiḥ saha vibhaktena pitrā yat-svayam-arjitam/ vibhakta-jasya tat-sarvam-anīśāḥ pūrva-jāḥ smṛtāḥ//

A father could also completely retain his self-acquisition and his share in the ancestral property and on his death or on his widow's death, the property would be divided by all the sons equally. Kātyāyana stresses that the sons have equal ownership in the property of the grandfather, but that the son is not entitled to ownership over what is acquired by the father himself.[1] Manu, as we have seen above (145), refers incidentally to the ancestral property recovered by the father and declares it to be the self-acquired property of the father which he need not divide amongst his sons.[2] Bṛhaspati subsumes under self-acquisitions of the father ancestral property recovered by him with his own power as well as the father's gains through learning, valour, "etc.". It is added that the father has the power to make gifts at his will and that he can make an unequal distribution.[3] Kātyāyana has a śl. which refers to ancestral property taken away from the family by force or lost and recovered by the father which he need not give up to the sons at a partition.[4] Yājñavalkya does not explicitly refer to self-acquisitions of the father and contracting (in effect) the three ślokas by Manu into one, states: "Without detriment

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1. Kāty. 839; cp. Bṛh., cit. above, 98 fn.2
2. Manu 9, 209; Viṣṇu 18, 43.
3. See above, 157f.
4. Kāty. 866.

to the paternal estate whatever else is acquired by a man himself, or a [or: as a] present from a friend, or a [or: as also] nuptial present, shall not belong to the dāyādas. If anyone recovers ancestral property which had been lost, he may not give it to his dāyādas nor also what was gained by learning".[1] Yājñavalkya does not clearly answer the question whether sons and father are contemplated in his view as being simultaneously dāyādas - an anathema in the strict patrilineal and patriarchal family - in respect of ancestral recovered property deriving from the father's father etc., so that at a partition either the father or one of the sons can exempt ancestral recovered property, or whether a situation is referred to where the sons (dāyādas) are partitioning the father's property which may consist of inherited property and self-acquired property of the father.

V. References to Customary Law and Its Reflection in the Dharmaśāstras.

(1) Classification of Property in Dharmaśāstras and In Customary Law.

In the following we intend to trace some of the

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1. Yājñ. 2,118-9 [224; Dh.K. 1215a]: pitṛ-dravyāvirodhena yad anyat svayam-arjitaṃ/ maitram-audvāhikaṃ caiva dāyādānāṁ na tad bhavet// kramād-abhyāgataṃ dravyaṃ hṛtam-apy uddharet-tu yaḥ/ dāyādayebhyo na tad-dadyād vidyayā labdham eva ca//

questions discussed in the context of customary law. We have seen from the preceding discussion that (1) some Smṛtis subdivide property into the category of self-acquisitions of the father and property inherited from his father, (2) that there is a coextensive interest of father and son in respect of ancestral (grandpaternal) property, especially landed property, and (3) the peculiar value of such property from the point of view of the father's male descendants which is further illustrated by the rule that ancestral property recovered by the father was declared impartible by special provisions.[1] Finally we should be reminded that Smṛtis make distinctions between immoveable and moveable property for purposes of alienation and partition.[2] We have singled out some incidents which find their reflection in Tesavalamai[3], in Kandyan law[4] and in customs prevalent in South India.

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1. A text attributed to Śaṅkha goes even further and expressly admits the claims of dāyādas to land which had once been possessed by the family by assigning to the recoverer only a fourth part of the recovered land. Cit. in Sm.ca., 642 [Dh.K. 1207a]: pūrva-naṣṭāṁ tu yo bhūmim ekaś cābhyuddharet-kramāt/ yathā-bhāgaṃ labhante'nye dattvāṃśaṃ tu turīyakam//
2. ff. 158
3. Cp. Ch. I(5) above. The following references are to the text of the Tes. as printed in the appendix of H.W. Tambiah's Law and Customs of the Tamils of Jaffna.
4. On the relationship between Kandyan law and the Dharmaśāstras see Derrett, "The Origins of the Laws of the Kandyans", Univ. of Ceyl. Rev., 14 (1956) 105-150, cited as 'Kandyans' in the following.

That the Dharmaśāstras assimilated such incidents may be suggested on the basis that (1) early Dharmaśāstras (Manu, Gautama, Āpastamba, Baudhāyana, Nārada etc.) and the Arthaśāstra do not refer to these features or accept them only with modifications, that (2) especially medieval authors from the North have limited use for them, and that (3) they functioned largely in South Indian texts.

(2) The Classification of Property in Customary Law.

(a) Ancestral (Grandpaternal) Property.

The Tesavalamai = "Customs of the Country" (sci. as opposed to book law or conflicting usages of immigrants of various provenances) divides property into hereditary property of the father which is called mutusom (lit. 'cold property' or 'ancient property'; from mutu = old, som svam)[1], dowry (sīdanam), and property acquired during coverture, which is called tēḍiyatēḍḍam (lit. 'acquired property')[2].

The mutusom was mainly reserved for the male descendants, but at the same time formed the basis on which the whole family subsisted.[3] Kandyan law laid much stress

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1. Tamil Lexikon, Univ. of Madras.
2. See on these categories Tes. I, 1; Tambiah, The Laws and Customs of the Tamils of Ceylon, 36; tēḍiyatēḍḍam is the Tamil term for self-acquisitions to this day.
3. Cp. the notion of riktha mūlam hi kuṭumbam in Śaṅkha-Likhita's dictum. Cit above, 34.

on the distinctions between moveables and immoveables, and between inherited and acquired property.[1]

(b) Dowry.

The sīdanam differs from the dowry which was given to a bride in the strict patrilineal family of the Dharmaśāstras where the bulk of the property was confined to the agnates and where a bride of a male member of the family would have brought merely her dowry, consisting of ornaments, whereas the husband merely provided a place in the ancestral home. The dowry according to the Tesavalamai and Kandyan law was an essential part of the property belonging to a couple and would include immoveables unlike in the patrilineal, exogamous family of the Dharmaśāstras. The duty to provide for the dowry was binding not only on the parents, but also on the brothers.[2] With the receipt of the dowry the daughter's claim to the parental estate was satisfied, if there were other children entitled to succeed.[3] On her death the daughter's dowry devolved on her sisters and their issue in the absence of her own issue, and in the absence of her sister and her issue, to her brothers and their issue, and in their absence to the parents.[4] It is stressed that

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1. F.W.Hayley, A treatise on the Laws and Customs of the Sinhalese, 219. Derrett, Kandyans, 119 fn. 86.
2. Tes. I, 10;11; Tambiah, op.cit., 38; 96f. Hayley, op.cit., 333, 335.
3. Tes. I, 3.
4. Tes. I, 5.

the mother has no claim to the deceased's daughter's dowry, though a widow in distressed circumstances may receive the same as a matter of grace subject to a life estate.[1] Parents in affluent circumstances could increase the dowry.[2] It might always have occurred - not only during the reign of the Portuguese as the Tesavalamai states - that the dowry was taken indiscriminately from either sīdaṇam, mutusom, or the tēṭiyatēṭṭam,[3] because the necessity to provide a dowry was overriding any preference. It seems that the sīdaṇam became part of the common property until divorce or death of the husband. This type of property is recognisable in a few surviving śāstric texts[4] according to which the

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1. Tes. I, 6.
2. Tes. I, 5.
3. Tes. II, 2. In Kandyan law there is no such preference discernible.
4. See Kāty. 879-80; yal-labdhaṃ dāna-kāle tu svajātyā kanyayā saha/ kanyā-gataṃ.../// vaivāhikaṃ tu tad-vidyād-bhāryayā yat-sahāpatam/.../// vaivāhikaṃ is the audvāhikam or bhāryā-dhana which is normally mentioned in the Smṛtis (Manu 9, 206; Yājñ. 2,118; Nār. 16,6; Bṛh. 26,46.). The former kind (kanyā-gatam) may be identical with the so-called strīdhana which a man acquires as the dowry of the wife and which becomes part of the common estate of husband and wife or part of the estate of the agnates, but exempt at partition. See Maskarī ref. to above, Also Prajāpati who lists audvāhikam and strīdhana amongst the items of property which can be exempted at a partition between brothers. Dh.K. 1232b.

dowry does not become part of the wife's strīdhana, i.e. the wife's separate paraphernalia, but becomes part of the property of the unseparated agnatic collaterals but (naturally) exemptible at partition. In a nuclear family it constituted together with the mutusom, the nucleus for a community of acquisition.

(c) Community of Acquisition between Husband and Wife.

The subdivision of property into self-acquisitions of the father and property stemming from his father finds its parallel in the Tesavaḷamai with the difference that instead of the self-acquisitions of the father we have a community of acquisition between husband and wife created by marriage. This concept is represented, as we have seen (above, 43ff.), in the Dharmaśāstras by passages of Āpastamba, by the concept of dampatyor aikyam, and the text dampatyor dhanaṃ madhyagam, but plays a secondary role in the patrilineal and patriarchal joint family as contemplated in the Smṛtis, where property was acquired solely by the head of the family or jointly acquired by collaterals. The acquisitions there became part of the property of the agnates and acquisitions made by the wife would become the husband's property, if they are not strīdhana and consequently separate from the property of the husband or the agnates ab initio.

In customary law the wife's dowry and her husband's mutusom were joint for purposes of acquisition of property, the husband having a prerogative of management of the joint estate.[1] Even in the śāstric texts, though the rule dampatyor dhanaṃ madhyagam had not literal legal application, we find many traces of "a nexus of dependence and mutual responsibility which expresses itself in the property sphere".[2] Whereas the Dharmaśāstras stress the obligation of the male issue to pay their father's debt after his death this obligation was incumbent in the Tesvalamai on sons and widow whether they had consented to the contraction of the debt or not.[3] Amongst the Smṛti-authors it is Kātyāyana who tells us that the wife has to pay her husband's debts after his death out of her strīdhana, namely when on his impending death he had expressly directed her to pay and this even if she had not consented to the contraction of the debt.[4]

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1. Tes. IV, 1.
2. Derrett, ZVR 64(1962) 64 with reference to the fact that a spouse could not act as a surety (Yājñ.2,52) on grounds of their community of property and the wife's adhikāra in her husband's property in respect of maintenance, expenditure for family purposes, and the husband's right to utilise her strīdhana in certain cases without incurring debts (Yājñ.2, 148; Kāty.914).
3. Tes. IX, 3. Tambiah, op.cit., 107.
4. Kāty.547 [Dh.K. 714a: martu-kāmena yā bhartrā proktā deyam-ṛṇaṃ tvayā/ aprannāpi sa dāpyā dhanaṃ yadyāśritaṃ striyā// The Parā.mā. 270, reads: dhanaṃ dadyāt-suto yathā and seems to be in accord with the customary law referred to.

(3) The Mutual Interests of Family Members in the Family Property.

(a) Interests of the Daughter.

The right to a share which the son had in respect to the property of the parents competed with the interest of the daughter in so far as she had a right to maintenance and especially with her interest in the dowry which was of considerable importance and in the interest of the whole family because it was a matter of prestige and status that the daughter was properly married and provided with property, especially where marriage took place between cross-cousins or in any case with the small kinship group.[1] The Tesavalamai shows, by first dealing with interests of the daughters in their dowry, that their claims had to be satisfied before the sons could claim anything. But if there was sufficient property there was presumably no reason why sons might not be advanced at marriage, even if there were unmarried daughters. According to Kandyan law the daughter who married in binna - that is, she did not become a member of her husband's household, but retains full connections with her parents' or parent's household - shared the property with her sons and other unmarried daughters after the death of the parents. A diga married daughter - i.e. who goes to her

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1. Tambiah, op.cit., 96 f.

husband's house, adopts that house name, and becomes for all purposes a member of her husband's patrilineal family though the couple might not reside with the husband's father - could return during the lifetime of the father and be allowed to settle in binna.[1]

(b) Interests of Sons.

It is implicit in many provisions of the Tesavalamai that the nuclear household is envisaged as common and normal, that is, sons and daughters left the family at marriage, the daughters receiving the dowry in satisfaction of a share and the sons receiving a share of the ancestral property, mutusom, though they could not demand it as a matter of right.[2] If the father could not be induced to advance the sons, which would presumably depend on whether the parents could spare a slice of the ancestral property, the son would 'inherit' the mutusom only on the death of both parents. In the property acquired by the parents the sons and daughters had an equal right on the death of both parents according to the Tesavalamai and it seems that on the death of either spouse the survivor held an interest in a hypothetical share,

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1. Hayley, 389f. On the institution of marriage and its function in Kandyan law, see especially Derrett, Kandyans, at 109-116.

2. Tes. I, 1; IV, 4: "... If husband and wife have two or three or more sons, and have given and delivered to them a piece of ground or garden, and if, after having possessed it for several years, the father and mother die, which causes a division of the estate..."

namely half of the acquired property which would be worked out on remarriage.[1] In old age the parents might distribute the property acquired by them amongst their sons on the condition that the sons would maintain them. But there existed the right to recall the property if the sons neglected their duties.[2] It can be said that a separation of status and partition of property by metes and bounds as known to modern law would not take place until after the death of the parents. This enables Tambiah to state with reference to the Tesavalamai "that the joint family, consisting of the parents and children and their descendants was both undivided and indivisible".[3] But this ignores the possibility of the advancement of sons and their quasi-separation or residual jointness with parents and sisters. Before the sons had set up separate homes their acquisitions remained part of the 'common estate' except gifts by relations and friends.[4] The Tesavalamai indicates that even after marriage and establishing separate homes, the sons have to leave their acquisitions acquired before they

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1. Tes. I, 1; 10; 11.
2. Tes. I, 8.
3. Op. cit., 123.
4. Tes. I, 7; IV, 5.

married (and were advanced) in the common estate.[1] This may indicate that partition and separation in status in the modern sense was not known at least until the death of the parents and that the property assigned to sons was nominally or perhaps in some circumstances effectively still part of the common estate.[2]

In other words the mutual 'interests' in the property would endure even after the advancements of the sons, though this competes with the principle that once the couple had founded their own household a community of acquisition was created and the issue of the couple would have a primary interest in the property. We may add here that the sons had a customary right of protest against improper alienations of immoveable property in the interest of future generations.[3]

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1. In I,7 we read: "So long as the parents live the sons may not claim anything whatsoever; on the contrary, they are bound to bring into the common estate (and there to let remain) all that they have gained or earned during the whole of their bachelorship excepting ... [ref. to ornaments presented by parents or self-acquired] and that until the parents die, even if the sons have married and quitted the paternal roof". In IV, 5 it is stated: "... all the property acquired by the son or sons while they are bachelors must be left by them to the common estate when they marry; but this is by no means understood to include the presents that have been made...".
2. Cp. Kandyan law where property is said to be obtainable from parents and from children or grandchildren by virtue of paternity and by virtue of maternity. Hayley, op.cit., 219. It may imply that once a son had acquired a family he would be allocated property by his father.
3. See above, 100, the text of Vyasa; Derrett, Contr. Ind. Soc. 6(1962) at 26f.

On the question of the liabilities of sons we notice the rule in the Tesavalamai which says that "sons are bound to pay the debts contracted by the parents; and although the sons have not at the time the means of paying such debts, they nevertheless remain at all times accountable for the same".[1] We may infer that the sons were also liable for the personal debts of the mother incurred after the death of the father.

(c) Interests of the (Widowed) Mother or Widow (without Issue).

On the death of the father, the mother could remain in full possession of all the property till she remarried. She had a right to administer the whole property for the benefit of the children.[2] This would happen especially when the children were still minors.[3] On majority the sons could not demand any share as a matter of right, though sons presumably received advancements or even 'inherited' the mutusom subject to the rights of the widow.[4]

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1. Tes. I,7.
2. Tes. I,9. Hayley, 351f.
3. Tes. I,9.
4. In Tes. I,1 it is said that sons should inherit the mutusom on the death of the father, whereas in I,7 we read that only when both parents (the widow not having remarried) are deceased, the sons inherit the mutusom. This indicates that position might have been flexible in favour of the widow.

If the widow remarried she would forfeit her rights in the mutusom which belongs to her sons, besides half of the self-acquired property of her first marriage.[1] She would receive her dowry subject to the rights of unmarried daughters.[2] If there were not sufficient dowry-property or self-acquisitions left over, the mutusom served for her maintenance until remarriage or death.[3] The concurrent interests of sons and daughters and the widow which extended over the whole property were to some degree checked by the principle that the ancestral mutusom or the praveni of Kandyan law was preferably reserved for those "who bear the name of the family", so that the widow's claim was weak in respect to this kind of property. On the other hand there was the principle of the right of a widow to maintenance which would entitle her to a right in all property belonging to the family.[4] Primarily the self-acquisitions of the

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1. Tes. I, 10.
2. Tes. I, 10.
3. Cp. Kandyan law, Hayley, 355f.
4. The wife is entitled to maintenance even after divorce in certain circumstances; see Hayley, 287. Derrett, Kandyans, 118. On the śāstric provisions, see Manu 9, 191 which presupposes successive marriages of mothers and in connection with this śl. 192 which speaks of equal partition of the mother's property (mātṛka riktha) between uterine brothers and sisters. On remarriage and its effect in the property sphere see Arthaś. 3,2,19ff. Remarriage of widows and divorce were deprecated in the Dharmaśāstras (see Manu 5, 161-4; 3,65,69-70; 176; 3,160; 9,101) and their effect in the property sphere neglected.

couple must have been the category of property in which the widow was interested. Similarly we may assume that the institution of self-acquired property of the father in Smṛti texts (see above, 157f) was not only intended to be impartible (i.e. the father could not be forced to part with it) in the father's own interest, but also in the interest of the widow,[1] even if the institution was not contemplated as a community of acquisition.

On the other hand, we find that in Kandyan law the subdivision of property into moveables and immoveables and the paramount value of land would even reduce the widow's interest in the immoveable property self-acquired by the father during the subsistence of the marriage.

The widow might in rare cases inherit the whole immoveable property according to Kandyan law, that is, when the husband had no descendants (including adopted children), parents, grandfather or grandmother, brothers etc. the property might finally be left to the widow absolutely. On the other hand, even though there are children, grandchildren etc., their right might be postponed in certain circumstances, whereas other circumstances might justify

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1. Derrett, Kandyans, 130. The evidence cited by Hayley indicates that the right to praveni for maintenance is subject to the amount of self-acquired property, but not subject to the amount of dowry received, however large. Hayley, 355.

the widow's being left in possession of only a portion of the land for her maintenance.[1]

If the husband was joint with his collaterals and parents, the widow, according to Kandyan law, could presumably opt for a share in immoveable property for her maintenance whereas in moveable property she would receive a share equal to that of a child.[2]

(4) Conclusions. The Effect of Marriage and Kinship in the Property Sphere according to Customary Law.

A circle of relatives having an ill-defined mutual and varying interest in the estate which consists of property

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1. Hayley, 349. Cp. Bṛhaspati, cit. above, 121. See also Tambiah, op.cit., 112f., citing an account by Sir Alexander Johnstone on the customs of the Colombo Chetties of Ceylon, according to which the widow has a claim to her dowry and is given a part of the other property as may be stipulated for her by the Headman and the relations according to her age and situation in life in order that she may be enabled to reside with her parents or relatives without entering a second marriage. The eldest son would otherwise manage the estate and maintain the widow and the other children and if all children were under age the husband's relations and the Headman would take over the estate and maintain the widow and children. On the sons' marriage the estate and the widow must be given to the most experienced son in order that he maintain them. On the death of the remarried wife, the eldest son of the first bed, if he is a fit person, would enter upon the estate and maintain the widow and children. If he neglects his duties the Headman and the relatives must give the share appertaining to her from the estate and the remaining property was divided equally among the sons of the first and second bed.-
2. Derrett, Contr. to Ind. Soc., 6(1962), 20 fn.28. Id., Kandyans, 127f. Hayley, 351, 452f. For a particular method of working out the sonless widow's right in the joint estate of her brothers-in-law, see Sāyaṇa on Ṛgveda 1,124,7 as explained by Derrett at ZVR, 64(1962) 59 fn.82.

derived from the father's ancestors and the mother's dowry plus acquisitions of the couple, distinguishes the customary family referred to from the patrilineal and patriarchal family of the Dharmaśāstras. In the Dharmaśāstras the claims of the widow-mother were normally postponed to the sons' and further male descendants' rights, who would have the duty to provide for their mother. In the customary family the wife's or widow's interest, the daughter's right to a dowry consisting of immoveables, the sons' interest in the parents' property, especially in the ancestral paternal property competed with each other and were subject to events like divorce, and the mutual claims of the family members.

The father was a manager of the property because the existence of his wife and children hampered the full exercise of power in respect to alienations without corresponding benefit of the family.[1]

The size of the dowry was left undefined in the customary system and it may not only consist of immoveables but may perhaps amount to a larger share that a son would get. The Dharmaśāstras specify the daughter's interest as

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1. Tes. IV, 1: the husband may give 'some' part of the dowry; of the ancestral property brought by him into the family, he may make a gift of one tenth without the consent of the wife and children. Cp. the text of Bṛhaspati 14,6 [138; Dh.K. 803 b] which speaks of the consent of the jñāti as necessary for a gift of the ancestral property (kramāgataṃ dhanam). Above, 101 There are also restrictions on the power of the father if he wants to make a gift to nieces or nephews which would require the consent of the respective spouses' relations, because they had more than a spes successions. Tes.IV,2 and Tes.I,15.

being 1/4 of a share of a son, perhaps in view of the variableness of the daughter's share in customary law.

The mother's interest according to the Dharmaśāstras consists of a share equal to that of a son at a partition between sons (see above, 119f.) which again seems to be an attempt to specify and fix the mother's interest, though we notice that one Smṛti, less favourable than the customary law, makes the share subject to the amount of strīdhana in her possession which would occasionally consist of property, derived from the husband or his father.[1] The general policy of the Smṛtis is to delineate the rights of women and restrict the amount of property available for them, subjecting their total rights to a limited estate.

One of the essential features which accounts for differences between the śāstric pattern of the patrilineal and exogamous family and the customary system may be found in the institution of cross-cousin marriages or marriages within the small kinship group.

We have seen before that the circle of prohibited degrees for marriage was very large and that śāstric authors were averse to the custom of cross-cousin marriages. In

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1. 'Smṛtyantara', cit. e.g. in Sm.ca., 624: jananyāsvadhanā putrair-vibhāgeṃśaṃ samaṃ haret/.

customary law the circle of prohibited degrees was very small.[1] In contrast to the Smṛtis the customary law, especially in the South of India favoured endogamy within the kingroup, whereby kinship is traced in all lines through all links.[2]

In Kandyan law marriages with the maternal uncle's daughter, or a paternal aunt's daughter was desirable and even obligatory.[3] In some customs the person refusing to marry the cousin forfeited his or her right to the share or the dowry in favour of the party who was prepared to marry.[4] One of the purposes of such marriages was to keep the landed property within small kinship groups. For an illustration we may assume the simple situation of three families representing a kinship group and being connected by endogamous marriages, each family consisting of father, mother,

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1. Derrett, Kandyans, 111; Hayley, 178-4.
2. Nur Yalman, 'Caste Principles in a Kandyan Community', in: E. Leach (ed.), Aspects of Caste in South India..., 89 ff. On p. 89 the author states: "There are variations in Kandyan kinship. The pattern of inheritance, the pattern of marriage, the closeness of kingroup endogamy and the position of women all vary as between different economic classes and as between different castes. But among all groups, rich and poor, high caste and low, kinship is recognized in all lines through all links. The sister's husband's brother may be just important a relative as the father's brother".
3. Hayley, 155. Derrett, Kandyans, 110.
4. Tambiah, Laws and Customs of the Tamils of Ceylon, 93,96.

son and daughter. S1 of the first family (F1) would marry his mother's brother's daughter who would bring dowry from her family (F2). S1 would contribute his share of the ancestral property. S2 of F2 would marry D3 who would bring dowry from F3, S2 contributing his share in the ancestral property. S3 would marry D1 of F1. The consequence would be that the property of a family would potentially belong to all descendants of all the families of the kinship group and would in fact be circulating within the kinship group. Even where cross-cousin marriages were not followed or where such marriages were not advisable, e.g. because the family of the partner to be married had become impoverished or because there was no marriageable partner, marriages would take place with affinal relations who were of equal status so that kinsmen by marriage and descent became often the same.[1] Marriages were thus concluded with the aim to retain kinship ties between people of comparable wealth and ritual status.[2]

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1. Yalman, op.cit., 92. The author points to the fact that the Sinhalese do not use separate terms for these kinsmen by marriage and descent and continues that "this reflects the fact that most marriages are between persons already related by descent; relations are thus constantly turned into relations by marriage". According to Yalman the kinship group is recognized by outsiders as 'one people' (eka munissu) or 'one family'(eka pavula),and is considered to have 'one blood'. Compare the similar concept of sapiṇḍaship in the Mitākṣarā, below,257 The two components of the unity of the pavula were thus according to Yalman equal ritual status, a concept implying descent from a common ancestor, and co-operation which stems from the obligation inherent in marriage alliances.
2. Yalman, op.cit., 93.

In a settled society based on agriculture and observing the custom of endogamous marriages, the possession of land was considered especially valuable. The land which was received by a couple as a dowry and as an advancement to the son would be eventually form the property with the help of which the couple would set up their own descendants. The ancestral property was a kind of guarantee that the marriage bonds would be continued and the families connected by marriage must have had some residual interest, because the property of the couple might also in part become their descendants' property. In default of descendants of the couple, the property might even revert to relations by marriage in the absence of near agnates of the husband.[1] The requirement of consent by relations by marriage for an alienation is evidenced in Sinhalese and Tamil customs and numerous South Indian inscriptions.[2] The effect of cross cousin marriages, or in any case of the continuous inter-

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1. See Derrett, Kandyans, 130, for the succession scheme.
2. See Derrett, Kandyans, For the right of preemption for relations(jñāti, sapiṇḍas, and bāndhavas), neighbours and creditors see the texts of Vyāsa, Bharadvāja, Bṛh., Kātyāyana and other cit. in the Vyavahāra-nirṇaya, 355ff. See on the topic Derrett, Adyar Libr. Bull., 25 (1961) 13-27 and Univ. of Ceyl. Rev., 19(1961) 105-116 where the texts are cited in transl. The kinship group could thus prevent landed property from being transferred to outsiders.

marriage within the kinship group would effect that property which went out by marriage would return by marriages and would be held by the agnates or was in any case under their control. New acquisitions by a couple or an individual might also be utilised in the setting up of descendants, but it might also be inherited by relations by marriage. The result was that because relationship was traced through all lines and all links a concentric circle of relations had an illdefined mutual and varying interest in the estate which consists of property derived from the father's paternal ancestors and the mother's dowry plus acquisitions.

This is, essentially, a very different picture from the semi-nomadic concept of the family which we attribute to the ancient Aryans.

Chapter V

The Family as Reflected in Early Medieval Legal Texts

I. Preliminary Remarks.

In the present chapter we intend to trace the main currents of the exposition and interpretation of the Smṛtis in early medieval commentaries and digests, especially with reference to the meaning of and acquisition and enjoyment of dāya within differing patterns of families; the interests of non-sharers in the family property; the concept of sapiṇḍaship etc. This discussion will lead us in the subsequent chapters to the diverging views on the concept of dāya with their implications and to the diverging doctrines advanced by Jīmūtavāhana and his followers in Bengal and by the authors led by Vijñāneśvara.

II. Types of Families:

Elementary and Extended (Patrilineal) Family.

The elementary family is frequently contemplated in early medieval legal texts and is also reflected in inscriptions. In the North, though agnatic kinship prevailed, the elementary family, at least amongst brāhmaṇical communities, appears to be perpetuated in the traditional tendency that after the completion of Vedic studies one should marry and install one's own house-fire. Medhātithi, who wrote approximately between 825 and 900 A.D.[1], enjoins a father to equip a son,

[1] Kane, HDh, I, 275.

who has duly observed his duties and has acquired the knowledge of the Veda, with a share of the paternal property in order to facilitate him to enter the householder's stage.

Medhātithi stresses that a father should go begging for property in order to get his son married, if there is no property.[1] Such rules, as can be presumed, envisage a traditional, orthodox, brāhmaṇical elementary family of which we find traces in Dharmasūtras, Gṛhyasūtras, and some Smṛtis [2], rather than merchant or agricultural families. Amongst merchants the preservation and joint exploitation of common assets, including ancestral property, and amongst agricultural landowning families the value of land, especially the inherited land, would be characteristic features. Here we would also find that women have limited rights and are confined to maintenance. In Brāhmaṇical families, especially among poorer families, little property could be expected to pass out of the family and there was consequently no harm of women being heirs.

That the completion of Vedic studies and the capacity of performing the sacrifices of a householder are considered as an entitlement for partition is also evident from several

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[1] On Manu 3,3; Jha's ed., 2, 205: ...gṛhīta-vedaḥ pitrā kṛta-vibhāgo gārhasthyaṃ pratipadyate, nirdhanasyānadhikārāt/ yadi tu pitā nirdhanas-tadā sāntānikatayā dhanaṃ arjayitvā vivāhayet/ Tr. Jha, II, i,16.

[2] See above, 41 ff.

passages in Aparārka.[1] Haradatta, a southern author of ca. 1100 A.D.[2] would make the capacity and desire for performing sacrifices separately another 'time of partition' besides the usual grounds stated e.g. by Nārada.[3]

The śāstric condition of the permission for the son to establish a separate household, namely the completion of Vedic studies, does not imply that amongst communities where Vedic studies were not common, a partition during the lifetime of the parents would not occur. As we have indicated in the preceding chapter, the elementary family prevailed in South Indian custom, that is, on marriage the sons would establish their separate households.

From inscriptional material it appears that in many cases father and sons were holding property separately.[4]

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[1] On Yājñ. 2, 114(719): jyeṣṭhasya yad-anujaiḥ sahāvibhakta-dhanatvaṃ ucyate, tat-teṣāṃ madhye kaiścid-adhyetavye vede sati draṣṭavyam/adhīta-vedeṣv-adhigata-vedārtheṣu cāgnihotrādy-anuṣṭhāna(ṃ)-samartheṣu ca vibhāgo eva śreyān/ "When undividedness of the younger brothers is mentioned, it is meant that some of them have yet to study the Veda. If they have completed their study of the Vedas and have comprehended their meaning and if they are capable of performing sacrifices, like the agnihotra, then partition is preferable". The point is repeated in the comment on Yājñ.2,117(722): agṛhīta-vedatvam/api hy-avibhāge kāraṇam/.

[2] Kane, HDh, I,351.

[3] Nār.13,3; cit. above, Haradatta in Ujjvalā on Āp.214,1 [233; Dh.K.1164]:... yadā putrāṇāṃ pṛthak pṛthak dharmānuṣṭhāne śakti-śraddhe bhavataḥ so'pi kālaḥ/ "If the sons have faith and capacity to perform religious rites, this is also a time of partition". The text of course does not in itself authorize sons to demand partition at such a time.

[4]In a grant recorded in the Torkhede inscription of Govinda III. (A.D. 813) shares in lands were assigned to individual family members living in an agrahāra village, thus to a father, his sons, to brothers and to a person who is stated to have given the share assigned to him to his daughter's son. Cit. in A.S. Altekar, The Rāshṭrakūṭas and Their Time, 339: E.I. III, 54. Cp. also I.A., VII, 303. In the Beṇḍegṛṛ grant of Krishna dated 1249 A.D. eight cases of brothers and two of sons occur who are assigned shares separately. I.A. XIV,69. The Paithan plate of Rāmacandra dated 1271 A.D. in I.A. XIV, 315: a father living separately from his six sons and four cases of brothers living separately.

The well-known inscription from Maṇagoli in the Bijapur District (dated 1178 A.D.) codified, in a grant to all members of the village irrespective of caste, the order of succession to a person dying without sons in the following manner: his wife, daughter, divided parents, divided elder and younger brothers, their children, ... and any kinsmen and relatives of the same gotra who might survive, should take the possession of all his property, such as bipeds, quadrupeds, coins, house and field ...(assignment to temple).[1]

Nevertheless these references should not create the impression that the elementary family as a property-holding unit was in existence exclusively. Amongst commercial communities the dictum in the Smṛtis that by separation one would gain spiritual merit was hardly an incentive to separate. Reliance on and joint exploitation of assets would be characteristic of such families and the jointness in status of the males would avoid the control of the property by females and postpone their rights as heiresses or sharers of the property.[2] In the North the patrilineal joint

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[1] E.I., V, 28; [1.30:]...Maṇigavaḷḷiyal=aputrikaru sattar=appaḍ=avara dvipa - [1.31:] di chatuḥppadi [chatushpadi] - dhana-dhānya-gri(gṛi) ha-kshetrav=emb=initumam=ātana strī-mukhyar-āgi hemmgusu makkaḷu [1.32:] vibhakt̤ar=āda tāyi-tamde aṇṇatammamdir=avara makkaḷum a...giḷu jñāti gotra... Cp. Yājñ. 2,135-6.

[2] See J.D.M. Derrett, "Hindu Law in Goa: A contact between Natural, Roman, and Hindu Law". ZVR, 67 (1965) 203-236, at 207 f.

family held together by the agnatic bond of sapiṇḍaship was contemplated in pure vyavāhara context as distinct from the gṛhastha rules which would make a separate housefire and thus separate property necessary; the father, except in special cases, had the sole authority as regards the question whether there should be any partition or not. Thus Lakṣmīdhara cites e.g. Kātyāyana: "A father is independent, but (the son) whose father is living, the brother (whose elder brother is living), the brother's son, a younger member who is unseparated, a slave and menial (are dependent)".[1] The 'coextensive ownership' between father and son[2] resulted, if we understand Lakṣmīdhara correctly, in the father's being prohibited from dividing the property in unequal shares.[3] There is no evidence in the Kṛtya-kalpataru to show that a son could divide the property over the head of the father, except in circumstances contemplated in the Smṛtis.

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[1] S'1.466 (Kṛtyakal., 275); cp. Nārada 4,31 and 32; 33-7 (Kṛtyakal., 274.)

[2] See supra, 97ff.

[3] Kṛtyakal., 652; according to a gloss by Caṇḍeśvara in the Vivāda-ratnākara the result was the prevention of gifts by the father according to his choice. P.463.

II. Sapiṇḍaship: Marriage, Inheritance.

(1) Marriage and Sapiṇḍaship.

This subject is closely discussed by all medieval authors, who are generally disinclined to acknowledge the validity of marriages within the prohibited degrees of relationship laid down in the Smṛtis. Yet the custom of cross-cousin marriages was so inveterate that some śāstric writers concede it as a deśācara, a custom applicable only in the areas where the practice was established. Northern authors refuse to accept the validity of the custom or would not permit as applicable in the North, though it occurred there in practice as well. Medhātithi held the custom to be unauthoritative because it was against the Smṛti.[1] Lakṣmīdhara would allow such a marriage only as a deśācara, but holds that the prohibition would apply elsewhere.[2] Haradatta appears to support cross-cousin marriages - its justification, as he says, being based on one's predilection rather than on the necessity of a Vedic text.[3] In the Aparārka the possibility of marriages

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[1] On Manu 2, 18; see Jha's tr., I, i, 232-3, where Medh. also gives one(dubious)reason how the custom could arise.

[2] Kṛtya-kal., 21. Ibid., Gṛhastha-kāṇḍa, Introd., 22.

[3] On Āp.-dh.sū. 1,4,12,11 (71): yatra tu prīty-upalabdhitaḥ pravṛittir na tatra śāstram asti Haradatta: yatra tu pitṛṣo asṛsutā-mātula-sutā parinayanādau/prīty-upalabdhitaḥ pravṛttir na tatrotsannapāṭham śāstram-anumīyate, prīter eva pravrtti-hetoḥ sambhavat // 11 //.

within the prohibited degrees or within the same gotra is refuted, though after a lengthy discussion.[1]

(2) Inheritance.

In the North, where agnatic kinship was especially strong, sapiṇḍaship was mainly associated with offering of piṇḍas to agnatic ancestors. The agnatic bond of sapiṇḍaship comprised three generations in ascent and three generations in descent from a particular person.[2] The differing attitudes in these śāstric texts are probably related to the fact that kinship system of the dominant groups and castes in the contemplation of authors from the South differed from those which northern authors had in mind. This induced some of the southern writers to accommodate southern customs, whereas the 'orthodox-śāstric' authors could better afford to follow Smṛtis which adhered to the strict agnatic exogamous kinship system. We have seen that the custom of cross-cousin marriages or repeated endogamous marriage bonds existed in the South. Here the relations by marriage had pervasive 'interests' in one's property. We have also indicated that this system differed from the agnatic patrilineal exogamous family system which we attribute to the Smṛtis. The references which we have given above indicate that the establishment of the northern śāstric patrilineal family was not ubiquitous and uniform.

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[1] on Yājñ. 1, 53 (82-4).

[2] Medh. on 5,60 is the basic passage.

III. Acquisition and Enjoyment of Dāya.

(1) Acquisition of ancestral (grandpaternal) Property.

Northern authors followed the concept that Property, its acquisition and enjoyment was solely deducible from the śāstra (śāstraikādhigamya). The best-known exponent of this view was the author of the Smṛti-samgraha who is commonly identified with King Bhoja, known as Dhāreśvara (Lord of Dhārā).[1] But the question arose whether dāya would include any asset acquired by popularly recognized means or whether the acquisition of dāya had to be gathered from the śāstra, whereby in view of Gautama's text[2], ownership could arise only as riktha, i.e. after the death of the father and equivalent causes of extinction of right or on account of samvibhāga, i.e. when the father, or even the eldest son[3] after the death of the father would choose to divide. We have seen in the preceding chapter that in customary law a circle of family members and especially the descendants had a claim on the property on account of their relationship. Ownership arose not merely on death or on partition in the case of sons, but their right in the property preceded the death of the father and existed independently from partition, especially in the case of ancestral immoveable property.

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1 Kane, HDh, I, 275ff.

2 See above 68.

3 See Manu, above 49f.

In accordance with these śāstrically undocumented notions there arose a theory advocated by Mīmāṃsaka philosophers that ownership is not only deducible from the śāstra but that acquisition as a legal concept was laukika, 'secular', or loka-siddha, 'secularly established, established by the lay public in actual usage'.[1] Thus it was possible to account for the fact that as soon as a son was born, he was felt to have some claim on the ancestral (grandpaternal) property or even in the father's self-acquired property. The Northern 'orthodox' authors felt the difficulty in the interpretation of those śāstric texts which speak of the 'coextensive ownership' of the father and son in grandpaternal immoveable property. Manu, as we have seen[2], apparently refers at one place to recovered ancestral property as not partible by the father, implying that normally ancestral property has to be divided among sons. Medhātithi discusses this passage closely. Partition, he says, is preceded by existing proprietary right (svatva) but nevertheless the father can dispose of paternal property in mortgage, sale etc. for religious purposes or support of the family.[3] We see that

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[1] On the disquisitions about Property being śāstraikādhigamya or laukika, see J.D.M. Derrett, "The Right to Earn in Ancient India", JESHO, 1 (1957) 66-97.

[2] Above ,91ff.

[3] On Manu 9,209 (Dh.K.1213b): svatva-pūrvakatvād-vibhāgasya/ bandha-krayādi-kriyāsu pitṛ-dhanaṃ jāta-putreṇa na niyoktavyam/ yoga-kuṭumba-bharaṇādau tu viniyogo darśitaḥ/.

Medhātithi was aware of the popular notion that the son's birth tends to restrict the father's power in so far as he was not supposed to use the property for purely personal purposes. He admits that sons may in practice or according to custom divide the ancestral property by force and concedes that if the son does enforce a partition against the father's will, ownership (svāmya) exists, yet if property is acquired in this way, it would be impure.[1] Therefore if there is some other expedient, the father is not to be asked to divide, as the son would be acting against dharma.[2] Thus it appears that Medhātithi sees the solution of the problem from two angles: a father acting within dharma and not prejudicing the maintenance of the family has to set up in life a son(who is qualified)for which purpose he might even have to go begging. On the other hand a son acting within dharma would not ask for partition. This also appears from his remarks which follow his discussion referred to above:

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[1] On Manu 9,209 [Dh.K.1213b, 1214a]: ācāre cāsyām-avasthāyām putrāṇām svāmye pitrā cā'kāmena vibhaktān iti nindādarśanād-balād-vibhājayantaḥ pāpā ity-anumīyate/ yathā'sateratigrahena bhavati svāmyam, doṣas tu puruṣasya, tenānvayāgatam itīdṛśam-aśuddham eva/.

[2] Ibid.: ataḥ sambhavaty-upāyāntare na pitā arthanīyaḥ/ adharmo hi tathā syāt/ - There could be righteous and unrighteous properties (dharmādharma-svātvāni) according to Lakṣmīdhara, Kṛtyakal., Gṛhastha-kāṇḍa, 259.

"Even self-acquired property is to be divided when the father knows that the sons are qualified".[1] The special reference to self-acquisitions of the father seems to suggest that Medhātithi does not want to view the question of the son's right in ancestral property separately from the son's right in the father's self-acquisitions, and that he views all property, grandpaternal as well as self-acquisitions of the father as all belonging to the father. In other words the distinction between the two categories is not of such importance to him. A right to ask partition was not recognized and the rights of the son amounted in effect to an equal share in the ancestral grandpaternal property at a partition.[2] This is also the opinion expressed by Dhāreśvara, as cited by Jīmūtavāhana.[3] The endeavours of Medhātithi to check the customary belief in the rights of the son arising by birth does not hinder his utilising the concept in contexts where the reference would not directly endanger the father's right. Medhātithi even cites incidentally an anonymous text which declares that 'the son becomes the owner of the property as soon as he is born'.[4] The purpose of the citation of the

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[1] Ibid.: svayam-arjitam api dhanam adhikāra-praptān-guṇavataḥ putrān jñātvā vibhaktavyam eva/.

[2] Ibid.

[3] Dāyabhāga, 31; Colebrooke's tr., II, 15.

[4] On Manu 9,212 [Dh.K.1544b]: yat uktam 'samutpanne vācyaḥ svāmī'ti/.

text by Medhātithi was to oppugn the argument that on the death of a reunited brother his share could not accrue to a unreunited uterine brother, because the death of a brother is not shown to be the time of the acquisition of the property deriving from the father. Medhātithi holds that property is 'by birth' insofar as it would entitle the sons to the property - in the light of śāstra which constitutes a kind of superimposed corrective - as soon as the father is dead so that a uterine brother would have a claim to the reunited brother's share in preference to a non-uterine half-brother.[1] But though the son's ownership is by birth according to Medhātithi, the sons are aprabhu during the father's and mother's lifetime.[2]

Elsewhere Medhātithi also presupposes that ownership arises on partition, i.e. the receiving of a share.[3] His discussion on this point reveals that he holds that the śāstric provisions on the modes of partition of the father's property, if transgressed by one of the brothers, do not prevent his ownership in the property taken in excess. Similarly, he says, as theft creates ownership. But obviously Medh. would consider such property as impure, whereas pure property can only be acquired with reference to the śāstric modes of partition.

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[1] On Manu 9,212.

[2] Ibid.

[3] Manu 5,110 (; tr. 3,i,136f.)

According to Viśvarūpa, a Southerner, who wrote ca. 800-825 A.D.[1], ownership in ancestral grandpaternal property arises not from partition, but precedes partition.[2] This in fact anticipates Vijñāneśvara's proposition that ownership of the son in respect of ancestral grandpaternal property is by <u>birth</u>. But Viśvarūpa does not establish this expressly and it does not seem that he believes that the son has ownership by birth in respect of the father's <u>self-acquired</u> property. He refutes the three objections which were levelled at his proposition: These were: when property is held in common between father and the son, the Vedic injunction to perform sacrifices with one's <u>own</u> wealth would not be possible to obey as soon as a son is born. Moreover the ~~te~~ text of Yājñavalkya which leaves the mode of partition open to the discretion of the father[3] would be superfluous. And lastly, one cannot say that a sacrifice could be performed with the permission of the son, as one just born cannot give permission. But Viśvarūpa takes Yājñavalkya's text 'bhūryā pitāmahopāttā.../... sadṛśam svāmyaṃ pituḥ putrasya cobhayoḥ' as proof that <u>svāmya</u> exists before partition. The text which provides for the discretionary power of the father at partition relates in his eyes to self-acquired property of

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[1] Kane, <u>HDh</u>, I, 263.

[2] Proemium to Yājñ. 2,122=2,124 according to the Trivandrum Skt. Ser. ed., 244.

[3] 2,115=2,118 acc. to Viśvarūpa.

the father which is his property and facilitates the sacrifice with one's own property. Alternatively a partition would procure the necessary separate property needed at the sacrifice.[1]

Aparāditya does not hold that ownership in ancestral property arises on partition. The result would be, he says, that ownership could be established by force.[2] In fact according to this author grandpaternal property is sādhāraṇam dhanam for father and son as soon as the son is born. But what about the Vedic injunction that Vedic sacrifices have to be performed with one's own wealth? Three alternatives are suggested: the father can perform with the consent of the son, or he may separate the son, or lastly, he may acquire property for this purpose.[3]

(2) Separation of Status between Father and Son.

The Concept of Pāratantrya.

The references to Viśvarūpa and Aparāditya also clearly disclose that a father could separate the son from himself

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[1] P.245:... tat svayam-ārjitenāpi tat-siddherna kiñcit/ tadānīm eva vā vibhajyānuṣṭhānam astu/ yā tvicchayā vibhāga-smṛtiḥ sā svayam-upātta-dravya-vato draṣṭavyā// ataḥ svatve sati vibhāga iti siddham//124//.

[2] On Yājñ. 2,121 [729]: yadi ca vibhāgaḥ svāmitve hetus- tadā haṭhādinā kriyamāṇo'pi taj-janayet/.

[3] Ibid.: na hi jāta-putrasya dhane svāmyam-apaiti, yena svadhana-sādhyārthāḥ s'rutayo virudhyeran/yady-api tad-dhanaṃ svasya putrasya ca sādhāraṇaṃ tathā'pi putrānumatyā putra-vibhāga-pṛthak-karaṇena dravyāntarārjanena vā śakyata evāgnihotrādi kartum/.

and terminate the son's further claims in the property of the father. Medhātithi shows that until partition or until the son has established his own household the son's position is characterised by pāratantrya, 'non-independence' with reference to all assets. After partition the son is independent in respect to his self-acquired property.[1] Whether a son will be completely free in respect to the property assigned by the father is, however, another question. Haradatte e.g. would give the parents a right to recall property to secure their maintenance.[2]

(3) The Right in Self-acquisitions of the Father.

Viśvarūpa and Aparāditya tend to consider the self-acquisitions of the father as a category distinct from the grandpaternal property and serving the father's own direct individual purposes; the father is not compelled to make partition or any arrangement as regards the mode of division of that property.[3] The co-extensive right of the father and

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[1] On Manu 8,163 (vol.2, 154): putrasyāpi yat-pitari pāratantryam tad-pṛthak-kṛtasya tad-gṛhe nivasataḥ/ yadā tu pitṛ-vibhakto dhanaṃ svayam-arjitavāṁs-tadā "ūrdhvaṃ tu ṣoḍaśad-varṣāt-putraṃ mitravadācaret" iti svātantryam eva/.

[2] On Āp.-dh.sū. 2,6,14,1 ( ): vibhāgāt-ūrdhvaṃ pitror-jīvanābhāve putra-bhāgebhyo grāhyam ity-uktam bhavati/ Cp. the provision of the Tesavaḷamai, above, .

[3] Viśvarūpa on Yājñ. 2,114 (=118) ( ): ne putraiḥ pitā vibhāgaṃ viśeṣa-niyamaṃ vā kārayitavya ity-arthaḥ/

son in grandpaternal property confines the father's exclusive ownership to the property acquired by himself. Medhātithi, as we have seen, views grandpaternal property and the father's self-acquisitions as primarily the father's estate. The distinction between the father's self-acquisitions and grandpaternal property suggests that sons were contemplated as leaving the father's house taking a share of the grandpaternal property whereas the father retains his own property, which is in fact exemptible at partition. The concept of the family differs from that contemplated by Medhātithi where the question of self-acquisitions of the father would not arise in so many words, as in fact the whole property tends to belong to the father exclusively.

In the Aparārka and Bālakrīḍā the equal ownership of the father may be described as converging on the grandpaternal property which constitutes a common fund. The method of treating self-acquisitions of the father separately from the ancestral grandpaternal property may be explained in terms of customary law as referred to in the preceding chapter.[1] The text of Bṛhaspati which says that the father need not divide his self-acquisitions is understandable in the same light.[2] The concept is an elementary family, the father rather a manager than a patriarch. The sons leave at

[1] See above, 184 .

[2] See above, 170, 157f. Cited as Kātyāyana's in the Aparārka, 728 .

marriage and the father or rather the parents remain confined to the father's self-acquisitions. The rules on exemptions, applicable in the patriarchal family only among sons, apply in this family to the father as well. Aparāditya says in a passage which deals with the exemption of self-acquisitions at partition: "Among those undivided in estate property in excess of another acquired by one member without the detriment to the paternal estate and without living on it, by oneself, whatever is received from friends, what is received from the father-in-law and the like at marriage, with that the dāyādas have no connection".[1] In another passage Aparāditya shows what constitute self-acquisitions of the father: property acquired by the father without living on the property of the grandfather.[2]

(3) Joint Acquisitions: Aparārka.

In the Smṛtis acquisitions made by the brothers became either the property of the father who, however, was under the obligation to distribute the property equally[3] or, in

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[1] On Yājñ. 2,119 = 2,118 (723): avibhakta-dhanānāṁ madhye yena pitṛ-dhanasyāvirodhenānupaghātenānupajīvanena svayam-ekākinaiva yad-anyad adhikaṃ dhanam-arjitam, yac-ca maitraṃ mitrādavāptaṃ, yac-codvāhikam-udvāhe śvaśurādibhyo labdhaṃ, na tad-dāyāda-saṃbandhi bhavet/ na tad-vibhajanīyam/kiṃ tūpārjakasyaiva tad-ityarthaḥ/.

[2] On Yājñ. 2,121 [728]: etat-pitāmaha-dhanānupajīvanena pitary-upārjite draṣṭavyam/.

[3] Manu 9,215; see above,151 .

any case, such property became common property between the dāyādas and was to be divided equally.[1] A son not actively participating in the acquisition of property and its preservation or acting fraudulently, could be separated by the father with a symbolic portion of the new acquisitions. This is to prevent future disputes with that son and his children. This would, however, not prejudice the son's right to an equal share of the nucleus consisting of the father's property including other, e.g. the grandfather's property.[2] The disadvantage for the sons was that the title to property was acquired by the father who could divide it unequally.[3] But Aparāditya further contemplates the possibility that brothers remain united and acquire property jointly, which would occur mainly amongst commercial communities. He remarks: "If some property has been acquired by all (the dāyādas who are undivided) having regard to each other [or: intending mutual benefit, with the intention of

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[1] Yājñ. 2,120; see above,151.

[2] On Yajn. 2,116a (719):... yo vā dhanārjana-samartho 'pi śaṭhayā dhanasyārjana-rakṣaṇānukūlāṁ ceṣṭāṁ na kurute, tasmai kiṁcid-asāram-alpakaṁ dhanaṁ dattva pitrā pṛthak-kriyā kāryā/anyathā tena tat-santatyā vā vivādaḥ syāt/ putraiḥ sambhūyārjite dhanaetat/ pitrādi-dhane tu samam - aṁśaṁ labhataeva/.

[3] See comment on Yājñ. 2,116b (720).

promoting each others' welfare, having each others' welfare in mind], it should be divided equally among them".[1] In a subsequent passage Aparāditya indicates that without separating from their father, brothers may acquire property of their own, e.g. carrying on independent business without detriment to the father's assets, and are then entitled to hold property so acquired within the framework of the larger family of undivided dāyādas. If a partition takes place the brothers would be exclusively entitled to their joint acquisitions. The context in which this question is dealt with is the right of the widow, whose right to the property held jointly by her husband and brothers is expressly excluded.[2] That the widow has no claim to the joint acquisitions of brothers is reiterated in the interpretation of Śaṅkha-Likhita's text which had assigned the property of a sonless person to brothers, the parents, and then to the eldest widow of the propositus.[3] Aparāditya's treatment of reunion

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[1] On Yājñ. 2,120 (726f.): ...sarveṣām paraspara-sāpekṣānām arthārjane sati samo vibhāgaḥ kāryaḥ/.

[2] Yājñ. 2,135f.(734): tatrāpi caiṣā vyavasthā yadi tad-bhrātṛbhiḥ sva-pitṛ-dhānupaghātena sambhūya/samutthānena dhanam-arjitam, tadā pitroḥ sad-bhāve'pi bhrātara eva dhana-grāhiṇaḥ/ yadā tu pitṛ-pitāmahādy-uparjitam dhanam, tadā na bhrātṛṇām dhana-bhāgitvam kintu pitror/iti/ "Here the following conclusion seems reasonable; if brothers have acquired property with joint efforts (almost:in partnership) <u>without detriment to their father's property</u>, then, even during the existence of the parents, the brothers alone obtain title to those assets. But if the property was acquired by the father or grandfather, then the brothers are not entitled to distribute it, but the parents".

[3] P.744:... tat-pitṛ-dhanānupaghātenārjita[ā?]vibhakta-dhaneṣu bhrātṛṣu draṣṭavyam/ atādṛśa-bhrātṛ-bhāve ca pitarau jyeṣṭhā vā patnī/

is also influenced by commercial considerations of a kind of partnership between the brothers, because each of the reuniting brothers acquires an interest in the acquisitions proportionate to the property brought into the common fund at the time of reunion.[1] By jointness through reunion the deceased person's right would accrue to uterine brothers (reunited or unreunited), sister, widow, daughters, parents.[2] Aparāditya considers the rules on reunion as a qualification to the rules which would allow the wife, daughter and parents to succeed to the property of a person dying sonless.[3]

(4) The Right to Partition.

A corollary of the attitude to consider the father as a manager is the right of the son to ask for partition in respect to ancestral property. Whereas Viśvarūpa does not mention this right explicitly, Aparāditya states it unambiguously: "In the grandpaternal property, the grandson has coextensive ownership. Therefore, even against his own wish, the father must divide his father's property at the son's desire. There should be equal division; there cannot be unequal division as in the case of self-acquired property."[4]

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[1] On Yājñ. 2,138-9 [747]: vibhaktasya dhanasya vibhaktenaiva dhanāntareṇa miśranaṃ saṃsṛṣṭaṃ tadvān-saṃsṛṣṭī,.../ [748]: ...tena saṃsarga-samaye tadiyaṃ yāvad-dhanaṃ saṃsṛṣṭaṃ vibhāga-samaye tad-anusāreṇaiva bhāgaṃ labhate/.

[2] P.748. Cp. the text of Bṛhaspati, above, 164 .

[3] P.747.

[4] On Yājñ. 2,121 [728]: pitāmaha-dhane pautrasya svapitṛā tulyaṃ svāmyaṃ, tena vibhāgam-anicchannapi pitā sva-pitṛ-dhanaṃ putra-vibhāgecchayā vibhajet/ samaśca vibhāgo na svārjita-dhanavad viṣamaḥ kāryaḥ/.

IV. DEFINITION OF DĀYA.

The definitions of dāya given by early commentators reflect the different opinions on the manner in which property was owned by the family. One of the characteristic features of the family in the North was, as we have seen, the agnatic bond of sapiṇḍaship. The agnatic members of a family which were undivided were called sapiṇḍas and simultaneously dāyādas. The property was to be managed by the eldest living male ascendant, that is, he had to employ the property, especially the ancestral property, for the spiritual and material benefit of all members of the family and had to provide for the 'maintenance' of the deceased ancestors. He had to preserve the property, especially the ancestral property, to facilitate the enjoyment of it for future generations. The 'ownership ' or 'management' of the property was adjusted to patriarchal principles, and the next eldest male descendant became on account of his birth ipso facto the next owner of the property. A father and head of the family could, if he wished, separate one or some of his sons and these would be eventually in the position of co-owners with their sons, the apportioned property being ancestral grandpaternal property. Ancestral property and self-acquisitions of the father were viewed as 'paternal' property which included accretions like self-acquisitions of the sons, and property acquired with the help of the paternal property.

The brothers could set aside self-acquisitions at a partition. An early definition shows that dāya is the 'paternal' estate: pitṛyaṃ jñāti-dhanaṃ vā/- "Father's property, or the property of a relation (?agnate).[1] The implications of the concept of sādhāraṇam which are reflected in a right to share the ancestral grandpaternal property and in the idea of sapiṇḍaship being congruent to dāyādaship, made the son in practice a 'quasi-owner' of the property of the father.[2] Authors like Medhātithi refuse to recognise the implications of this notion and rely on the text of Gautama giving the traditional times of partition. Medhātithi says that dāya stands for property obtained by descent which implies that all property has to be first the father's before it can become the son's property.[3] Dāya according to this author is also property 'which is given' by the father to the son after the latter has acquired the knowledge of the Vedas, that is dāya does not belong to the son a priori and is a

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[1] Bhāruci on Manu 10,115; cit. by J.D.M. Derrett in ZVR, 64 (1962) 15ff. at 54.

[2] E.g. Medh. says on Manu 8,27 which deals with guardianship by the king over a minor: dāyādaḥ svāmyatrocyate. Dh.K.1951 b. Cp. also Halāyudha in Abhidhāna-ratnamālā: dāyāda means 'son'. Cit. by J.D.M. Derrett, J.Ind.Hist. 30(1952) 36ff. at 42 fn.21. The terms dāyāda, svāmi, putra, and sapiṇḍa tended to coalesce in their connotations.

[3] On Manu 10,115[Dh.K.1126b]: dāya'nvayāgataṃ dhanam/.

kind of allotment, advancement, or gift.[1] According to the description of dāya in the Smṛti-saṅgraha dāya includes property which has come from the father and the mother.[2] To describe property derived from the mother as dāya would not create difficulty in the strict patrilineal family where such property would be strīdhana and separate from the property of the agnates.

In the South the position was much more complex because of the simultaneous coextensive interests of the family members in the common property. Thus the property of the father was simultaneously the son's on account of his birth, and the wife's on account of her marriage. The wife's dowry was in fact part of the estate. The daughter's birthright, well established in customary law, as we have seen, is recognized in principle even in the Aparārka.[3] One early

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[1] On Manu 3,3 (; tr.II, i,16): dāya is dīyata, i.e., 'it is given', in the sense of property given to the wife. This explanation of dāya also occurs in the Aparārka where dāya is equated to bhartṛ-dattam, a gift from the husband. See below, .

[2] Cit. in Sm.ca. etc. (Dh.K.1142 a,1142b): pitṛ-dvārāgataṃ dravyaṃ mātṛ-dvārāgataṃ ca yat/ kathitaṃ dāya-śabdena/tad-vibhāgo'dhunocyate/

[3] On Yājñ. 2,136[746]: duhitṛṇāṃ putravaj-janmanaiva pitṛ-dhane svāmi-bhāva-siddhir iti veditavyam/ But the share which unmarried sister receives from her brothers according to Yājñ. 2,124 (see above,) is expressly said not to be dāya. This may be directed against customary notions.

writer, whom the Mitākṣarā followed in this respect, defined dāya in the following manner: "That is signified by the word dāya which becomes the property of another solely by reason of relation to the owner."[1] But such approach was bound to be considered as incomplete because nothing would be expressed by this definition about the pervasiveness and extent of dāyādaship of sons, daughters, wives, and collaterals - some holding that women are not dāyādas at all and that strīdhana could not be denoted by the word dāya.[2] In the Aparārka dāya is equated to riktha in one place[3], and elsewhere riktha is explained as pitṛ-dhanam which includes, it is said, the property of a jñāti. This may refer to property deriving from the great-grandfather or perhaps to the property of the mother as well whose property would be part of the common estate. The customary tendency to consider the property of the mother as part of the common estate is reflected in the description of dāya as pitror-dhanam in another context in the Aparārka.[4]

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[1] Asahāya, cit. in the Sarasvatī-vilāsa, Foulkes's ed., para. 19.

[2] See discussion in the Sar.-vil. paras. 21, 333.

[3] On Yājñ. 1,51 [77].

[4] On Yājñ. 3,227 [1046].

V. The Definition of Partition.

Whereas śāstric-orthodox authors would not feel the necessity of defining the partition between father and sons because sons were held not to have any right before partition, authors who contemplated the son's ownership as pre-existent to partition and coextensive with the father in respect to ancestral grandpaternal property would have to offer a new definition of partition. Aparāditya holds that partition between father and sons or between brothers establishes individual ownership of each of the sādhāraṇam dhanam in the share assigned to each of them, but does not create ownership. Gautama's text refers to the fact of the production of ownership in a particular share.[1]

VI. The Rights and Position of Women within the Framework of the Family.

(1) Medhātithi.

The position of the wife is characterised by the concept that 'husband and wife differ only in their bodies and in all functions they are entirely united'.[2] In connection with ch.3, śl.202 Medhātithi discusses the question how a person proceeding on a pilgrimage and travelling without

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[1] 752: saṃvibhāge hi sādhāraṇa-dhanānāṁ svāmināṁ-ekaikatra bhāge svamena ekaikasya svāmyaṃ vyavasthāpayati, nāpūrvam-utpādayati/

[2] See comment on Manu 3,32.

his wife could perform religious rites, i.e. śrāddhas at tīrthas out of the sādhāraṇam dravyam, since the wife's association and acquiescence would not be available. The answer is that the husband has to ask the wife's permission.[1] for the performance of śrāddhas before he sets out for the pilgrimage in the following words: "I shall be spending our belongings on religious performances".[2]

Common property between husband and wife is the basic assumption according to Medhātithi,[3] but, as in the case of an elder brother being head of the undivided family, when the younger brothers would not be independent in the disposition, women possess as a principle pāratantrya, 'non-

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[1] The Indian method of stipulation follows a regular scheme. The proposer proposes and the opposite party assents thus: evam(iti).

[2] Vol. 1, 267f.: atha kevala gṛhasthaḥ pravaset-tadā bhaved agny-abhāvaḥ/ kintu madhyakatvad-etasya sahādhikārāc ca, bhāryāyām-sannihitāyāṁ, tad-icchāyā abhāvāt kathaṃ sādhāraṇasya śrāddhe viniyogaḥ/ sādhāraṇe hi dravye anyatarān-icchāyāṁ tyāga eva na saṃvartate/... pravasan bhāryām-anujñāpayati "dharmāya viniyogaṃ dravyasya kariṣyāmi" iti/ tat-prāptānujño'dhikariṣyate/ Elsewhere Medh. says that as the parents have joint authority over "everything" (sarvatra sahādhikāra) the father is entitled to give the daughter in marriage only with the consent of her mother (on Manu 5,150).

[3] On Manu 8,163 (vol.2, 152): yataḥ sādhāraṇaṃ dhanaṃ/

independence'.[1] Though women have no right to enter into legal transactions independently in respect of the common property as a general principle, they have a right to spend out of their <u>own</u> property after seeking the advice of their male protectors and apparently out of the <u>common</u> property for purposes known to law. The wife, the student and the slave possess each their own peculiar degree of non-independence as an owner. Because property is common between husband and wife, the wife is also never entitled to spend property for sacrifices etc. without the husband's permission.[2] Medhātithi reconciles the Smṛti-texts which speak on the one hand that the mother lives under the protection of the sons[3] after the death of the husband and on the other hand that sons are non-independent as long as the parents, i.e. including the mother[4] are alive, by referring them to different contexts. That is, when the son is a minor he is not independent and <u>impliciter</u> the mother - in the absence of

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[1] Ibid., 153: tathā'kule jyeṣṭha'ity-upakramya 'tat-kṛtaṃ tat-kārya-jātaṃ nāsvatantra-kṛta'm iti ca/ dhana-sādhāraṇye hi puruṣo'pi strīvad-asvatantraḥ/ yac-chabde svāmyaṃ pāratantryaṃ ceti tad-viruddham-iva svāmitvasyety-etaśca vyavastheti yojyaṃ bhavati/ pāratantryaṃ parividheyatā tad-icchanuvartitvam /yadi ca paratantraḥ pareccham-antareṇa viniyoktaṃ na labhete kidṛśamasya svāmyam/ atha dānādhāna-vikraye yatra prakṛtvad-aniśaḥ/ svaśarīre paribhogādau yāvad-iccham sva-dhanaṃ viniyojyate, paratantra-mahādhanānāṃ śāstra-nigṛhītātmanāṃ dvijānāṃ nātmopabhogo bhavet/ bālasyas svāmya-pāratantre upapanne/yadā prāpta-vyavahāras-tadā īśiṣyate/evam putrādav-api striyās-tu na kadācid-apāratantryam/-

[2] Ibid., 153: teṣu svāmina ity-etad-apekṣya bhāryā-śiṣya-dāsīnāṃ yathāsvam pāratanryam/ dhana-sādhāraṇāt tu na bharturanujñāṃ vinā bhāryāyā yāgādau kvacid-adhikāra iti sthitam/

[3] See above, .

[4] See above, .

the father - would manage the property, whereas the subjection of the mother to the son refers to the duty of the adult son to protect her property against thieves etc.[1]

It is interesting to note that Medhātithi ultimately envisages the wife as manageress if the husband is incapable to transact business because of senility.[2] This would, of course, also apply in situations, where the husband is otherwise incapable of acting as manager and in the absence or minority of male family members. Similarly Aparāditya envisages the mother as a 'manageress' in certain circumstances.[3]

(2) Viśvarūpa

At a partition between father and sons, the wife of the father as well as widows of predeceased sons and grandsons are entitled to the share of their respective husbands if they have not received strīdhana from the husband or the father-in-law. If they have not received strīdhana they

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[1] Ibid., 154.

[2] Ibid., 154:...yasya tu bhartuḥ strī jānānā kārya-prabandhena vartate taya'anujñātam-etad-bhavati/

[3] See below, 222. For the quasi-managership of the widow/wife see Nār. Dh.K.696 and 698; Kāty.545,578. Dh.K.713, then 8,167. See also Haradatta, referred to below, 228. On the question of the wife-mother-widow as manageress in modern Hindu law, see below, 425 ff.

should receive a share equal to what the strīdhana would have been and this amount should not exceed 2,000 paṇas, according to the text of Vyāsa which is mentioned without name. This provision applies even when the property is very large. When the property was small the wives would obtain equal shares.[1] Viśvarūpa does not allow the right of the sonless widow to inherit from her husband. The text of Yājñavalkya, he says, concerns a pregnant widow, the widow thus being contemplated as a kind of trustee for the son who might be born.[2] On the death of the son who dies without son, widow or daughter, the property goes to the mother or grandmother[3] rather than to the parents jointly.

(3) Aparāditya

Community of ownership is evidenced in the comment on Yājñ. 2,52[4] where Aparāditya stresses that the text of Yājñavalkya does not apply to husband and wife, as there is

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[1] On Yājñ. 2,115(2,119 according to Triv. ed.) ( ): samāṃśa-dāna-pakṣe pramīta-bhartṛkāḥ putra-pautra-patnyaḥ sva-patnyaśca bhartṛ-bhāgārhāḥ kāryāḥ yāsāṁ bhartrā śvaśureṇa vā svayaṃ vā strīdhanaṃ nadattam yad-va yāsāṁ strīdhanaṃ nadattam ~~yad=va=yasam=stridhanam~~ tāḥ strīdhana-samāṃśikaḥ kāryaḥ/ 'dvisāhasraḥ parodāya striyā' iti smṛty-antarāt-tāvan-mātraṃ prabhūta-dhanatve'pi deyam/ svalpe'pi samāṃśatvenaiva/

[2] Cp. Vasiṣṭha 17,41; cited above, 139 .

[3] On Yājñ. 2,135-6 (139-40) ( ): mātā ca pitā ca pitarau/ sahādhikarāt-tu dvandva-karaṇam-ekaika-prāptya-artham/ dvandva-nirdeśepi mātur-eva-prāthamyam/

no division between them, the wife being the owner of her husband's property simply by virtue of her being his wife and that hence property is common between husband and wife and cannot be divided.[1] The specific property of the husband or father is, as we have seen, his self-acquisitions rather than the ancestral property which are common to father and sons. Consequently the sons having received a share in the ancestral property on majority, would not be entitled in principle to partition the property on the father's death. (See also the comment on Yājñ.2,114(719): the sons are not independent as long as the mother is alive). Only on the death of the father and mother would the sons receive the property ('their') in equal shares.[2] Especially when the sons are minors the widowed mother could act as a manager of the estate according to Aparāditya, a fact which shows that he has a nuclear family in mind and that jointness of the sons of the deceased with a paternal uncle is not primarily visualised.[3]

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[1] P.654: na hi tayor-dhana-vibhāgo'sti, pati-dhane hi jāyā svāminī jāyātvād-eva/ ato dampatyoḥ sādhāraṇaṃ dhanaṃ aśakyaṃ vibhaktum/ See also comment on 2,136, cited below, 223.

[2] On Yājn. 2,117(720): māta-pitror-maraṇād-ūrdhvaṃ tayor-eva riktham-ṛṇaṃ ca putrāḥ samaṃ yāvanto bhrātaras-tāvato bhāgānpraty-ekam-anyūnādhikān-ṛṇasya dhanasya ca kṛtvā bhajeran/ tataśca yo yāvantaṃ dhanasya vibhāgaṃ/

[3] On Yājñ. 2,114 (719) he quotes Śaṅkha (see above, 34) and adds: mātuḥ kuṭumba-bhāraṇa-sāmarthye saty-etad/...

Consequently as soon as the sons have studied the Vedas and possess ceremonial competence a partition would take place and Aparāditya stresses that Yājñ. 2,117[1] should not be understood to lay down that partition takes place only after both the father and mother are dead, which, we may say, amounts to saying that the sons may partition the property provided they secure the claim of the mother in the property by giving her a share equal to that of a son.[2]

Whereas the right of the widowed mother in the family property seems thus well accounted for, Aparāditya has to argue strenuously in favour of the sonless widow's right against her husband's collaterals and father-in-law. Following Āpastamba he holds that ownership of the widow arose at marriage and cannot be obstructed by the father's and brothers' ownership.[3] The whole discussion is designed to contradict the views of authors who had held that the widow should only be allowed to take the estate of her husband if she submitted to niyoga. Dhāreśvara's opinion

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[1] See above, 132 fn.1.

[2] On Yājñ. 2,117[722]: na ca pitror-ūrdhvaṃ vibhajeranneveti vyākhyeyam/- On the mother's (and co-widow's) shares see comment on Yājñ. 2,123[730].

[3] On Yājñ. 2,135-6[746]: "pāṇi-grahaṇāddhi sahatvam" ity-ādinā''pastamba-vākyena bhartṛ-dhane strīṇāṃ svāmitvaṃ pāṇi-grahaṇam eva sādhayatīti vidhīyate/ duhitṛṇāṃ putravaj-janmanaiva pitṛ-dhane svāmi-bhave siddhir-iti veditavyam/ tataśca patnyāṃ duhitari satyāṃ tayoḥ svāmitvaṃ bādhitvā pitrādi-svāmitva-avidhiranena vākyena na kāryaḥ/...

e.g. was that Yājñavalkya's text on the right of the sonless widow applied to the widow of a separated brother who must submit to niyoga in order to be entitled to the estate.[1] We have to keep in mind that Aparāditya presupposes separation as the normal state of the family when he discusses the right of the widow. He holds that according to Yājñavalkya's text the widow is entitled to the whole estate of her husband which must include not only his self-acquired property but also his share of the ancestral property.[2] That a separated brother's sonless widow could inherit was not established universally in practice, as we know from inscriptions.[3] The Aparārka does not expressly speak of a separated brother having received a share of the ancestral property to which the widow succeeds as well as to her husband's self-acquisitions. This may be because he takes into account the possibility that the husband had acquired property while living separately from his agnatic relatives but dying undivided in respect to the ancestral property. Here the widow would succeed in any case to the property self-acquired by the husband.

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[1] Cit. in Mit. on Yājñ.2,135-6(239;I,i,8). Bhāruci had also recommended niyoga. See Kane, HDh, I, 266.

[2] On Yājñ. 2, 135-6(742f.):...patnī pitṛ-bhrātṛ-sādbhāve'pi svayam eva pati-dhanaṃ samagraṃ gṛhṇāti, patyuśca śrāddhādi karoti...tatha yā pitṛ-dhanānupaghātena svayam-arjayitur-bhartuḥ paricaryāṁ yathāvat-kṛtavatī samyatendriyā ca sa bhartuh sakalam eva dhanaṃ devereṣu vidyamāneṣv-api gṛhṇāti/ yā tu tāruṇyādinā sambhāvita-vyabhicāra tasyāṁ vidyamānāyam api mṛtakṣya bhartur-bhrātṛ-gāmy-eva vittaṃ, na tu patnī-gāmi/

[3]Ep.Carn, III, Tirumakūdal-narsīpur 21(1222); M.A.R. 1920 para. 77(1297); Ep.Carn., IX, Nelamangala 12 (c.1330), Kakanhalli 81 (1306), Channapatna 13 (1318). Ann.Rep. Ep. (Madras), no. 258 of 1926: gift by widow of some lands which had become hers on account of the death of her husband and his brothers. See Derrett, JIH, 30(1952) 35ff. at 47 fn.39.

Property which had been acquired jointly by the deceased with his brothers would accrue to the brothers by survivorship, and would be divisible between the brothers at a partition whereas ancestral property would still be subject to the right of the parents to divide it.[1] Aparāditya also controverts the objection advanced by those authors who held that property was destined for religious purposes, such as the Vedic sacrifice, and that the widow, because of her incompetence at the performance of such sacrifices would not be entitled to the estate of her husband. Property, he says, serves human purposes; besides śrāddha-ceremonies women are entitled to pūrta, i.e. meritorious religious acts,[2] and they are entitled to employ the property for this purpose.[3]

It seems that a brother who was not yet separate from his younger brother, because the latter might be still studying the Vedas or might be a minor in any case, could

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[1] Ibid., 743; tatrāpi caiṣā vyavasthā - yādi tad-bhrātṛbhiḥ sva-pitṛ-dhanānupaghātena saṃbhūya samutthānena dhanam-arjitaṃ, tadā pitroḥ sadbhāve'pi bhrātara eva dhana-grāhiṇaḥ/ yadā tu pitṛ-pitāmahādya-upārjitaṃ dhanaṃ, tadā na bhrātṛṇāṃ dhana-bhāgitvaṃ kintu pitror iti/

[2] On the meaning of pūrta see P.N. Sarasvati, The Hindu Law of Endowments, 25ff.

[3] Yājñ. 2,135-6(742f.) See also Viśvarūpa on Yājñ.2,144 (Mit.= 2,140): because of the "human-purposeness" of property (puruṣārthatvād-dravyasya) it does not exist only for those who have ceremonial competence. Dh.K.1398b, 1399a.

make gifts to his wife, or after his death his widow could receive an annual allotment up to the value of 2,000 kārṣā-paṇas according to the text of Vyāsa.[1] We are left to surmise that this gift or allotment was made out of the undivided property though perhaps only if there are no self-acquisitions of the husband. It is said that the woman may utilize this in an 'irreproachable manner' but (otherwise) according to her pleasure. If the amount taken by the widow is to be exceeded, the consent of the husband, of the husband's younger brother and others with whom the husband died undivided, was necessary.[2]

(4) Haradatta

Haradatta, commenting on Āpastamba, perpetuates many features of the traditional elementary brahmanical family of the early Dharmasūtras. There is no reference to ancestral grandpaternal property and sons leave when they have the capacity to perform sacrifices separately. There

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[1] See above, 109f..

[2] On Yājñ. 2,143 (752): praty-abdaṃ kārṣā-paṇa-sahasra-dvaya-parimito dhanasyaika-deśaḥ paro deyaḥ striyai deyaḥ/ paraḥ paramaḥ/ dīyata iti dāyaḥ/ tam-imaṃ dāyaṃ bhartṛ-dattaṃ vā'niṣiddhena mārgeṇa yathā-kāmaṃ devarāder-anumatim-antareṇāpy-apnuyāt/ ato'dhike tu devarādya-anumatir apekṣa+nīyety-arthād-gamyate/

is a community of acquisitions between husband and wife.[1] But though there is community of ownership there is inequality between husband and wife. Whereas the husband is 'independent' and has thus free power to spend the 'self-acquired' property (or rather the property jointly acquired by husband and wife) without the permission of the wife,[2] the wife has only a right to spend property for household purposes and may make occasional gifts in the absence of her husband from home whereby she does not commit theft.[3]

As religious works can only be performed jointly by husband and wife there is no need of separate property in the shape of a share for the wife at a partition between the father and sons. In fact if the sons are already married at partition each son and his respective wife, the father and mother receive each one share, though the father's

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[1] On Āp.-dh.sū. 2, 6, 14, 16-17 (; Dh.K.1406): dravya-parigraheṣu dravyārjaneṣv api tathā sahatvam/

[2] P. (Dh.K.1406a): etad-eva dravya-sādhāraṇyepi dampatyor-vaiṣamyaṃ yat-patir-yatheṣṭaṃ viniyuṅkte jāyā to-etāvat-eveti/

[3] P. (Dh.K. ibid.): ऋi yasmād-bhartuḥ pravāsesati naimittike dāne chindat-pāṇi dadyād-ityādike dāne kṛte bhāryāyā na steyam-upadiśanti dharma-jñaḥ/ yadi bhartrur-eva dravyaṃ syāt syād eva steyam/

share may be larger.[1] At a partition after the father's death the mother may receive a share equal to that of a son according to Yājñavalkya (2,123; see above, 119 .). Haradatta adds that the sons should control the mother in the spirit of the dictum of Manu[2] which disallowed independence to women.[3]

The right of the sonless widow to inherit is also not fully recognized by Haradatta. He states that the nearest sapiṇḍa of the deceased takes the dāya, adding that the widow should be maintained by the sapiṇḍa who takes the wealth. The text of Vyāsa assigning to a widow 2,000 paṇas as an annual maximum is referred to and held to apply in case of abundant wealth. The texts admitting the right of the widow to the property of her husband (like Yājñ. 2,135) serve according to Haradatta merely for an argument a fortiori in securing the wife's maintenance. He asserts that the wife takes along with sapiṇḍas an equal share as in the case of a partition between sons after the death of the father.[4]

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[1] P. (Dh.K.ibid.): 'jīvan-putrebhyaḥ' ity anena bhāryāyā bhāgo na darśitaḥ/ tatra kāraṇam-āha/ jāyā-patyor iti/ spaṣṭam/ kasmāt/pāṇītyādi// karmārtham dravyaṃ jāyāyāśca na pṛthak karma-svadhikāraḥ/ kiṃ tarhi sana-bhāvena'yastvayā dharmaśca kartavyaḥ so'nayā saha'iti' vacanāt/ tatra kiṃ pṛthag-dravyeṇeti/ On Āp.-dh.sū. 2,6,14,1( ): bhāryāyā apyaṃśo na darśitaḥ/ ātmana evāṃśas tasyā apīti manyate/ vakṣyati jāyāpatyor-na vibhāgo vidyata iti/ See above, 180 , for the rights of the parents to recall part of the divided property for their maintenance.

[2] (9,3; see above, 106 fn.2.

[3]P. : pitur-ūrdhvaṃ vibhajatāṁ mātāpyaṃśaṃ samaṃ hared iti/ atra coktam/ putrair eva saha vṛtiḥ syād iti/

[4]On Āp.dh.sū. 2,6,14,2 ( ): etad-prabhūte dhane, jñātayaśca na rakṣeyur -iti śaṅkāyāṁ/ patnī duhitraścaivetyādi (Yājñ. 2,135)/ yāni patnyāḥ dāya-prāpti-parāṇi tānyapi evam-eva draṣṭyāni//... atra striyā saha sapiṇḍā bhajeran/ tadā strī saha tair-ekam-aṃśaṃ gṛhṇīyāt/

Chapter VI

Jīmūtavāhana, Raghunandana, and Śrīkṛṣṇa.

I. Preliminary Remarks

The persistent doctrine of the son's co-extensive ownership over the granddfather's property prior to partition which resulted in the doctrine that right in property arose by mere relationship, that is in the son's case by birth, tended to limit the father's power over the property and came under attack by Jīmūtavāhana. He criticises openly his predecessors who - in following their ācāryas - 'did not full comprehend the precepts of Manu and the rest'.[1] The artful balance which e.g. Medhātithi maintained between recognizing on the one hand the customary birthright of the son[2] and the right of the son in the grandfather's property prior to partition, and on the other hand by holding that ownership arises on partition, was completely dismissed by Jīmūtavāhana. He favoured Smṛti-texts which unambiguously reflect the sole ownership of the father and suggest that the father was uncontrolled by the son.

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[1] Colebrooke's tr. I, 1; cp. XV, 1f. It could not have been Vijñāneśvara whom Jīmūtavāhana criticised, because the Dāyabhāga was composed before the Mitāksarā. See J.D.M. Derrett, "The Relative Antiquity of the Mitakshara and the Dayabhaga", Mad.L.J. (1952) 1ff.

[2] See above, 200ff.

The concept of the family which emerges is entirely patriarchal, and though Jīmūtavāhana may have overstated his case, the legal framework which he worked out remained the basic pattern for his successors. Jīmūtavāhana perpetuated the patriarchal notions represented in early Smṛtis and some of the later Smṛtis in which there was no question of the son having any legal right in the father's property prior to the death of the father or to partition at the father's desire. On the contrary Jīmūtavāhana does not only negative such rights but maintains the right of the father in the person and the property of the son as a principle.[1]

II. Jīmūtavāhana's Dāyabhāga and Raghunandana's Dāyatattva.

(1) The Concept of Dāya.

(a) Definition and Etymology.

In the beginning of the first chapter of the Dāyabhāga[2] Jīmūtavāhana defines the term dāya: tataśca pūrva-svāmi-sambandhādhīnāṁ tat-svāmy-uparame yatra dravye svatvaṃ tatra nirūḍho dāya-śabdaḥ/- "The word dāya has become established in current usage to signify the wealth, in which property dependent on relation to the former owner, arises

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[1] XI, i, 29.

[2] The references are to Jīvānanda Vidyasāgara's 2nd ed. and/or Colebrooke's tr.

on the demise of that owner (or: on the extinction of his ownership)."[1] Jīmūtavāhana derives the term dāya from the root dā = to give[2] and tells us that the use is metaphorical, as only the same (similar) consequence of a gift (dīyata = "what is given") is produced by cessation of the former owner's right through demise or other causes of extinction, but not through actual abdication (tyāga). We have seen that dāya was originally derived from the root dā = to cut, divide etc., reflecting the notion that the father divides his property during his life-time. But by the time Jīmūtavāhana composed his work, the term had long come to be used as the property of a living or deceased person and, in so far as it related to the estate of a deceased person, it was synonymous with riktha, a term which originally exclusively meant the property of a deceased person. Later in the 17th cent. the derivation of the term by Jīmūtavāhana was accused by Mitra Misra of artificiality and as incompatible with the simultaneous assumption of a technical meaning.[3]

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[1] P.5; tr.I,5.

[2] Cp. the similar explanation by Medhātithi and Aparārka, above, 24 . This explanation goes against the assumption of a birthright of the son who would own already the property and need not be given property.

[3] Vīramitrodaya, 411 f.

(b) Acquisition of Dāya.

Though the term signifies the property of any rela who is next in order - this being worked out on the hei having capacity to confer or offer spiritual benefit to deceased[1] - Jīmūtavāhana spends nevertheless much space the dāyādaship of the sons indicating thereby that also according to him the sons occupy a central position in continuation and preservation of the family, though thi did not amount to actual right in the father's property Jīmūtavāhana cites three main theories according to whi the sons were said to obtain rights in their father's property: birth[3], partition,[4] and the extinction of the of the father by death or other causes, or as he says, right may be also due to the survival of the son. Part cannot be a cause, as ownership may then also arise on partition of the goods of a stranger and as right vests the death of the father without partition in the case o an only son.[5] In I,11 he examines the possibility of 'ownership by birth' which he rejects with reference to

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[1] Ch. XI.

[2] On the importance of descendants in the male line, so grandson, and great-grandson, see XI, i, 31-36.

[3] Predecessors of Vijñāneśvara, see above, 200, 205, 216.

[4] Dhāreśvara, see above, 203 .

[5] I, 11,12.

Manu's text 'ūrdhwaṃ pituśca matuśca...' (9,104) and Devala's text which had laid down that there should be partition after the father's death and that as long as the faultless father is alive, the sons have no svāmya.[1] He obviates the idea that the son merely lacks independence, asvātantrya, an idea adopted by other authors who thus evaded the difficulties posed by those Smṛti-texts which laid down unmistakably the exclusive ownership of the father. The possibility of svāmya in case of the son is only admitted by Jīmūtavāhana in respect of the self-acquired property of the son.[2] Jīmūtavāhana sees as another argument against the theory of 'ownership by birth' the consequence of admitting the correctness of such a theory, namely that the son would have to be allowed the right to demand partition against the will of the father.[3] Medhātithi had evaded this logical consequence of the pre-existing right of the son in the grandpaternal property by holding the property which was acquired by forcing a partition upon the father as impure and the act of the son as directed as against dharma.[4] But the view that svāmya was created nevertheless

[1] See above, 130, 131 fn. 3

[2] I, 16, 17. Whereas Viśvarūpa and Aparāditya had argued that the father may use the self-acquired property for religious rites, Jīm. argues from the opposite point, namely the son must have a right in his self-acquisitions for performing religious rites.

[3] This could not have been directed against the author of the Mitākṣarā who had admitted the son's right to partition against the father's will. See Derrett, ubi cit.

[4] See above, 202 .

was not tolerated by Jīmūtavāhana and might have stimulated him to negative the son's right completely.

Then he points out that birth is not listed as a mode of acquisition in the literature and asserts that there is no śāstric proof that property is vested by birth alone: janmanaiva svamity-atra pramāṇābhāvācca/[1]

It seems here that Jīmūtavāhana recognizes birth as one of the constituent factors leading to the ownership of the son. It may be suggested that he also recognizes the strong tie between father and son, though this does not amount to ownership of the son according to him. The son is rather only the first heir in the order of succession. Whereas it seems from the definition of dāya that he accepts two causes of the son's right, i.e. the birth of the son which ~~he~~ creates the relationship between the father and the son + demise of the father or other causes of extinction of the father's right, he shows in the following that this is not necessarily so, perhaps because he does not want to create the slightest impression that birth could be after all a cause of property and perhaps because according to nyāya the son's ownership could not have two causes.[2]

But as birth of the son cannot be the cause of the son's right, can the right arise by the act of another, i.e.

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[1] I,19.

[2] I,20.

by the demise of the father?[1] Jīmūtavāhana refers us to the analogy of the relation between donor and donee. Here acceptance does not, in his view, cause ownership, but the act of the donor, the relinquishment of his right in favour of a sentient being causes the ownership of the donee whose acceptance is only a manifestation of his right.[2] We may add, therefore, that dāya was acquired at the death, by a person who would be ascertained with reference to the order of dāyādas.[3] Raghunandana, writing in the 16th cent.[4] elaborates on the definition offered by Jīmūtavāhana and tackles Gautama's dictum which implied that 'ownership is by birth'[5] and which Jīmūtavāhana did not know of had ignored. Raghunandana says that it is through relationship of mere birth which is the cause of sonship (putratva) which is stronger than any other relationship, that the son's right accrues at the time of the father's right and which is superior to the right of any other relative.[6] He stresses that sons have no ownership on account of Gauûtama's dictum: "...after the extinction of the father's right, the son's right is effected through birth; consequently, by reason

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[1] P.13; I,21.
[2] I, 21-24.
[3] Cp. Raghunandana, Dāyatattva, 3; tr I, 15-17.
[4] See Kane, HDh, I, 418f.
[5] See below, 263 .
[6] Dāyatattva, 12; Setlur's tr., I,7.

of ownership, the son takes the property of his father, not, however, immediately after his birth while the father's right subsists".[1]

(2) Times and Mode of Partition.

(a) Self-acquired Property.

Jīmūtavāhana admits only two periods of partition in respect of self-acquired property: the extinction of the ownership of the father, i.e. when his ownership ceases due to pātitya (excommunication) or nisprhatva (absence of worldly desires which occurs e.g. in the case of vānaprasthya) or death, and when the property is divided with the will of the father.[2] He denies that the absence of worldly regards of the father together with the absence of the mother's capacity to bear children constitutes another reason for the partition of the self-acquired property, because this category must be partible only at the extinction of the father's right.[3] If the absence of worldly interests were taken as a separate period, this would lead to the assumption of four periods of partition: the demise of the father, his degradation, his disregard for secular objects, and his own choice.[4]

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[1] Tr. I, 14; t., p.3.
[2] I, 44.
[3] I, 39.
[4] I, 41.

The text of Hārīta and Śaṅkha-Likhita[1] which enjoin impartibility as long as the father labours under physical and mental disability, likewise do not justify a partition by the sons. Jīmūtavāhana notes an 'erroneous' reading which says that if the father is incapable of business, partition takes place. (I, 42,43.)

The father is also free in the method of distributing his self-acquired property and he may distribute this in unequal shares[2], but he may take into account good qualities of a son, his numerous family etc.[3]

(b) Ancestral Property.

The Smṛti passage which makes it a pre-requisite for partition that the mother should be past childbearing refers to ancestral property according to Jīmūtavāhana.[4] There are thus two periods of partition: the death of both parents or the will of the father + the mother being past childbearing.[5] The mention of the mother's death does not refer to the partition of the mother's goods.[6]

The text of the Yājñavalkya-smṛti 'bhūryā-pitāmahopāttā nibandho...' (2,12 acc. to Colebrooke's tr. of the Mit.)

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[1]Cit. above , 34 .
[2]II? 16,17; cp.55.
[3]II, 74.
[4]I, 45.
[5]II, 1-5,7.
[6]II, 6.

refers in Jīmūtavāhana's explanation to the case where A is the father of B and C. The latter is survived by a son D. Here B is not the sole owner after the death of A, as D confers the same spiritual benefit on the grandfather in the funeral ceremonies as B, and thus B and D share the estate of A equally.[1] The argument that property has to be divided per capita amongst brothers and their sons if the sons have equal ownership during the life-time of the father is refuted in the Mitākṣarā with the explanation that the allotment takes place according to fathers; sons of a predeceased brother take the share the brother would have got.[2]

The explanation of Yājñavalkya's text by Dhāreśvara, who had plausibly suggested that the father has to divide the ancestral grandpaternal property in equal shares, amounts in Jīmūtavāhana's opinion to a restriction for the father not to make an unequal distribution of the ancestral property, but does not imply 'equal ownership', as the father may retain two shares, and there is no right to ask for partition on the part of the son.[3] But we should mark here that Jīmūtavāhana accepts Dhāreśvara's interpretation in so far as the father has to divide the ancestral immoveable property, apart from the double share which he may retain,

[1] II, 9; for the rights of sons' sons see II, 10.
[2] II, 11; Mit., Colebrooke's tr., I,v,1-2.
[3] II, 15-19; 73.

equally.[1] But in the absence of any controlling rights of the sons and their absence of ownership, such injunctions amount in effect to moral injunctions directed against the father. Ancestral recovered property need not be divided by the father, but this does not imply that the father has to divide the ancestral property as such; it merely means that he may treat it the same way as self-acquired property.[2]

To the rule that the father has to divide ancestral property equally amongst his sons, an exception is mentioned on the basis of the text of Yājñavalkya 'maṇi-muktā-pravālānām...'[3], which indicates that the father owns and has the power to distribute ancestral gems, pearls, and corals as he can in respect of his self-acquired property.[4]

(c) Acquisitions by the Son:

Sections 65 to 73 of ch.II of the Dāyabhāga establish, by following the text of Kātyāyana[5], that if the son acquires property with help of the paternal property the father receives half of the acquisition, the son receives two shares and each brother one share. If the son acquires property without the help of the father's property, ~~then~~

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[1] II, 76 and 83, subject to 74. See the comment of Śrīkṛṣṇa on 74.

[2] II, 21.

[3] See above, 167 .

[4] I, 22.

[5] Śl.851; see above, 167 .

then the father receives two shares and the brothers receive no share.[1] But if the father is possessed of learning etc. he receives half a share.[2] We note that unlike in the Aparārka or Mitākṣarā[3] the father's right is not dependent on jointness of paternal or grandpaternal property between father and son and that a son may live separately having received a share of the paternal or grandpaternal property.

(3) Power of Disposition of the Father.

(a) Self-acquired Property.

There is no legal restriction on the power of the father in respect of gifts or other alienations whether it concerns moveable or immoveable, or ancestral recovered property.

(b) Ancestral Grandpaternal Property.

The text of Yājñavalkya 'maṇi-mukta-prāvālānāṁ sarvasyaiva pitā prabhuḥ/ sthāvarasya tu sarvasya na pitā na pitāmahaḥ//[4] is taken to mean that the father may alienate all moveable property, but not the whole of the immoveable property (sthāvarasya sarvasya), because this forms the basis of the support of the family.[5] But the possibility of a transfer of a part of the immoveable property etc. is

[1] II, 71.
[2] II, 72.
[3] See previous chapter, , and below, .
[4] See above, .
[5] II, 22-3.

implied in the prescription not to transfer the 'whole'.[1] But the father has authority to alienate even the whole immoveable and other property if the support of the family necessitates this.[2] In the following the author deals with the obvious question how far these precepts based on Smṛtis would affect his theory that sons have no right in their father's property before death of the father etc. or partition.

(c) The So-called 'Factum Valet' Doctrine in the Dāyabhāga.

The Smṛtis enjoined certain rules which, as we have seen, prohibit the alienation of all one's own assets if there was male issue[3], or the alienation of property which is necessary for the maintenance of the family,[4] or the alienation of ancestral property without the consent of the sons,[5] except for specific reasons where consent could be dispensed with.[6] Similarly the alienation of common property (sādhāraṇam or sāmānyam) by one of several brothers staying jointly is prohibited without the consent of the other co-owners according to a text of Nārada,[7] Dakṣa,[8] and Bṛhaspati.[9]

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1 II, 24.
2 II, 25.
3 Yājñ. 2,175; Nārada 5,4.
4 Kāty. 640.
5 Bṛhaspati, 14,5
6 See below, 270 .
7 Ubi cit.
8 Cit. by Lakṣmīdhara, Kṛtyakal., Dānakāṇḍa, 17 (Dh.K.807a).
9 14,2 (137; Dh.K.802a).

On the exact implications of these prohibitions the Smṛtis contain ambiguous references and three main schools of thought emerged on the effect of these prohibitions.[1] The first school consider the transaction as valid, but the transgressor sins and is perhaps liable to punishment, depending on the case. The second school hold the transaction voidable and the transgressor does not sin. The third school are of the opinion that the transaction is voidable and the transgressor does sin and is liable to punishment in an appropriate case. The views are discussed in Śaṅkarabhaṭṭa's discussion on the topic of dattāpradānikam (concerning non-delivery of gifts) in his [Dharma-] Dvaita-nirṇaya.[2] Śaṅkarabhaṭṭa holds the third opinion, whereas the first opinion - which represents the opinion of the authors from Bengal - is refuted by Śaṅkarabhaṭṭa.

Jīmūtavāhana illustrates the doctrine that the infringement of the prohibitions does not invalidate the transaction, though the alienor sins, at the treatment of the problem of the alienation of common property by one of the co-owners who holds an undivided share in the common property which can occur naturally only when brothers continue to remain

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[1] See J.D.M. Derrett, "Prohibition and Nullity: Indian Struggles with a Jurisprudential Lacuna", BSOAS, 20 (1957) 213ff.

[2] The work was written ca. 1580-1600. See Derrett, ubi cit., 208f., where the relevant passage will be also found in translation. Ed. Gharpure, Bombay, 1943, 123-4.

joint after the death of the father. Here a text of Vyāsa had prescribed as follows: "A single parcener may not, without the consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family." Separated kinsmen, as those who are unseparated are equal in respect of immoveables: for one has not power over the whole, to give, mortgage or sell it."[1]

This prohibition entails (it is said) only a moral offence when infringed by one of the undivided dāyādas.[2] Similarly other texts as e.g. one which prohibits the gift or sale of self-acquired immoveable property without the consent of the sons does not invalidate the transaction. And Jīmūtavāhana concludes: "Therefore, since it is denied, that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is null: for a fact (vastu) cannot be altered by a hundred texts."[3]

This discussion is inserted after the treatment of the question of the father's right to alienate the whole of the ancestral property for the support of the family or where

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[1] II,27: na ca sthāvarasya samastasya gotra-sādhāraṇasya ca/ naikaḥ kuryyāt krayaṃ dānaṃ paraspara-mataṃ vinā// vibhaktā' vibhaktā vā sapiṇḍāḥ sthāvare samāḥ/ eko hyanīśaḥ sarvatra dānādhamana-vikraye//

[2] II, 28.

[3] II, 29-30; t.,p.35: tena dāna-vikraya-karttavyatā-niṣedhāt tat-kāraṇāt vidhy-ātikramo bhavati na tu dānādy-aniṣpattiḥ vacanaśatenāpi vastuno'nyathā-karaṇā-śakteḥ//

the existence of the father is threatened unless he resorts to the alienation of ancestral immoveable property.[1] It has been consequently assumed that Jīmūtavāhana admits the power of the father to dispose of ancestral immoveable property absolutely without consideration of these texts which permit alienation of immoveable property only for specific purposes or with the consent of the sons. But we should keep in mind the object to which Jīmūtavāhana devoted the first chapter of the Dāyābhaga, namely to refute the opinion of predecessors or contemporaries who either tried to limit the right of the father in favour of his son or proceded to acknowledge the son's right by birth. This is evident from his definition of dāya, his attempt to explain the text of Yājñavalkya's 'bhūryā pitāmahopāttā' and many other instances. He dispels the impression that the father is limited as regards ancestral immoveable property and moveable property and that he is not allowed to transfer the whole of it for the maintenance of the family in the absence of consent by the sons. Thus he establishes the full power of disposition from the point of ownership. He believes that the father should have full authority, but also full responsibility for the family. The son's claim is consequently not based on a

[1] II,26; t.,33: yadi punaḥ sarvasthāvarādi-vikrayam-antareṇa kuṭumba-varttanam eva na bhavati tadā sarvasyāpi vikrayaṇādikam arthāt siddhyati/ sarvatra evātmānaṃ gopāyīteti vacanāt//

right in property, but on a right against the father as a person, a kind of ius in personam. We may remember that the original conception in the Brāhmaṇas was rather that sons were contemplated as 'living on the father', whereas the aged father used to 'live on the son'; until the patriarchal power became established in the Dharmaśāstras and limited the possibilities of the son to take over rights and responsibilities during the lifetime of the father. We believe that the implications of sādhāraṇam as the spiritual, socio-religious and material tie between father and son continued to be efficacious even in Bengal, though his actual legal right in property was suppressed in legal texts. It is significant that Jīmūtavāhana in his Vyavahāra-mātṛkā provides for an action against the father who alienated the whole ancestral estate which modifies his attitude taken in the Dāyabhāga, having in mind those who too readily transgressed the duties of a householder.[1]

(4) Enjoyment of Dāya by Brothers and Other Coheirs.

(a) Definition of Partition.

Before Jīmūtavāhana enters into the definition of the term dāya-vibhāga he discusses the question to what the rights of undivided dāyādas amount: has one of them a right to the whole property or does the right extend only to a

[1]Sir Asutosh Mookerji's ed., 285; the reference is cited by J.D.M. Derrett, ZVR, 64(1962) 151 fn.145.

part of the property? He comes to the conclusion "that relation, opposed by the co-existent claim of another relative, produces a right, determinable by partition, to portions only of the estate."[1] The right of a co-heir does not extend over the whole estate as one has to infer a divesting and vesting of rights to the whole estate which would involve (logical) cumbersomeness (gauravatva). Moreover the power of alienating would be missing which in Jīmūtavāhana's belief is an incident of ownership.[2] Here again we see that Jīmūtavāhana is intent to show that an owner has the power of alienating at pleasure, and if a dāyāda who owns dāya jointly with other dāyādas, alienates his portion without their consent (which smṛti required), he merely sins, but the transaction is valid.

Partition is defined in the following way: "Partition consists in manifesting[3] by casting of lots or otherwise, a property which had arisen on lands or chattel, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation because no evidence of any ground of discrimination existed."[4]

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[1] I,7; p.7: sambandhy-antara-sadbhāva-pratipakṣasya sambandhasyāvayaveṣv/eva vibhāga vyaṅgya-svatvāpādakatvāt.../

[2] Ibid.: yatheṣṭa-viniyoga-phalābhāvenānupayogāt//

[3] Monier-Williams, Sanskrit-English Dict., vyañj, caus. - - aṅjayati = to cause to appear, make clearly visible or manifest.

[4] I,8; t.,p.9: eka-deśopāttasyaiva bhū-hiraṇyādāv-utpannasya svatvasya vinigamanāpramāṇabhāvena vaiśeṣikavya vahārānarhatayā avyavasthitasya guṭikāpātādinā vyaṅjanam vibhāgaḥ//

"Or partition is a special ascertainment of property, or making of it known".[1]

Raghunandana in his Dāyatattva does not follow Jīmūtavāhana's definition: "partition is the adjustment by lot or otherwise into a right over a specific portion of that right which did, by reason of the same relation of the co-heirs, accrue to the whole property, upon the extinction of the right of the previous owner", that is, a co-heir could not alienate his share until partition.[2]

Raghunandana points to Smṛti-texts which deal with legal relations between dāyādas or co-heirs, i.e. relatives who have through the sameness of relationship equal claims to the property of the propositus. He cites a text of Kātyāyana from which we learn that a dāyāda is not liable for the use of any article, which belongs to all the undivided relations, and consequently an undivided dāyāda cannot commit theft as regards an article which belongs to all the undivided persons.[3] Only separated brothers may reciprocally be witnesses, sureties, bestow gifts and accept presents according to Nārada.[4] Moreover all acts performed with the use of joint property - whether spiritual or temporal - entitle the

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[1] I,9. Śrīkṛṣṇa adds: puruṣa-viśeṣa-nirūpitāṃśa-viśeṣa-niṣṭhatvenetyarthaḥ: by reference of a particular share to a particular person, t.,p.9.

[2] I;21; Setlur's tr., 472; see Colebrooke's note on Dāyabhāga I,8.

[3] Raghunandana, Dāyatattya, I,24 and VIII.

[4] 13,39.

brothers to its use jointly.[1] A text of Vyāsa is cited which similarly shows that the rights of the dāyādas accrued to the whole of the estate:[2] In I,28 Raghunandana sums up his discussion: "Therefore, when there are two persons equally related to the deceased, each of them considers the property left by the deceased to belong to himself as well as to the other co-heir. Gift and the like by the one for his own purpose is prohibited, should the other's consent be wanting".

(b) Alienation before Partition.

We have seen above that Jīmūtavāhana had apparently conceded to the individual dāyāda the faculty to alienate his undivided share though he may infringe a moral precept thereby. It is clear, however, from the description of ownership as yatheṣṭa-viniyogārhatva[3], his description of the fraction as ekadeśa, and the citation of the text of Nārada[4] that Jīmūtavāhana does not contemplate the possibility of alienation of property beyond the interest one has in the common estate. We should note that the Smṛtis do not contemplate the alienation of the undivided interest

[1] Raghunandana I,26; see Nārada 13, 37.

[2] I,27: "Let no one without the consent of the others, make a gift of the whole immoveable estate nor of what is common to the family."

[3] II,27.

[4] II,31; Nārada 13, 42-3.

by a brother and whenever they speak of shares, bhāga or aṃśa, it is used in connection with partition. Common property could only be alienated by an individual without consent and before partition, if certain specified reasons, like an emergency condition, family purposes or (a recognised) religious purpose justified the alienation.[1]

It is noteworthy that Jīmūtavāhana adduces only one Smṛti text to support his proposition of the alienability of the undivided share and this text by Nārada, one would think, was designed to establish the fact of partition rather than laying down the alienability of the undivided interest: "If there are several descendants of one man, who are separate in matters of performance of religious acts, in business transactions and in the implements of work, and who are not carrying on any business-dealings jointly, if they would give away or sell off their own respective shares, they should be free to do all this; as they are masters of their own property."[2] All non-Bengal authors at least took this text as referring to separated dāyādas.[3] Raghunandana in his Dāyatattva dissents from Jīmūtavāhana. Citing him he seems to associate the text of Vyasa with separated co-heirs

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[1] Raghunandana III, 31-2.

[2] Nār.13,42-3 (Dh.K.1583a): yady-ekajātā bahavaḥ pṛthag-dharmāḥ pṛthak-kriyāḥ/ pṛthak-karma-guṇopeta na cet kāryeṣu sammatāḥ// svabhāgān yadi dadyus te vikrīṇīyur-athāpi vā/ kuryur-yatheṣṭam tat-sarvam-īśās te svadhansya vai// Dāyabhāga, I,31; t.p.34.

[3] Dh.K., ubi cit.

where the consent may be optional; consequently the presence of consent of undivided coparceners is essential to validate the alienation. The consent can only be dispensed with in the well-known situations. Raghunandana makes an allowance in the case where undivided co-heir does not openly object to the alienations: "Consent, however, may be inferred from the absence of prevention. This follows from a text of Kātyāyana cited in the Prayaścitta-viveka: 'When the master does not prevent the gift of his own property by a co-sharer or even a stranger, then the gift is in effect, made by himself. This is ordained by Bhṛigu'."[1] Thus we may conclude that Raghunandana does not admit the alienability of property which is held jointly before partition for one's own purposes (I,28.) Due to his theory that the right of each of the co-heirs accrues in respect of the whole property, and that only on partition do the heirs become owners of their share, only consent could validate an alienation and the theory of Jīmūtavāhana that 'a fact cannot be altered by a hundred texts' would have no scope. In this respect Raghunandana is in line with the authors who followed the Mitākṣarā whom we shall consider in the following chapters.

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[1] V, 38,40.

IV. Śrīkṛṣṇa Tarkālaṅkāra's Dāya-krama-saṅgraha.

(1) Alienation of Ancestral Immoveable Property by the Father.

Srikrsna who wrote in the middle of the 18th cent. generally followed and elaborated the views of Jīmūtavāhana, but the perusal of his work does not create the impression that the father was authorized to alienate the ancestral immoveable property completely with the aid of the 'factum valet' doctrine. In his discussion on the partition of ancestral and self-acquired property, Śrīkṛṣṇa does not refer to the maxim. The text 'maṇi-muktā-pravālānāṁ...' admits according to him the gift of immoveable property not incompatible with the due support of the family.[1]

(2) Alienation of the Undivided Interest.

Here on the other hand, Śrīkṛṣṇa strongly supports Jīmūtavāhana's conception of partial rights and the alienability of the undivided share.[2] There is no general property of the co-heirs in the whole estate and it is fallacious to assume that a plurality of owners constitutes community. Community merely means the state of not being

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[1] Setlur's tr. VI, 19ff. L.N. Serma's ed., 45 f.: atra maṇi-muktā-pravālānāṁ-ity-upādāya punaḥ sarvasyety-upādānaṃ bhūmyāditritaya-bhinna yāvat sa/varṇādi-dravya-samgrahaṇārthaṃ dvitīyārddhe sarvasyety upādānāt sarvasya kuṭumba-varthanāvirodhena sthāvarāder na dānādi-niṣedhaḥ iti dāyabhāgaḥ/

[2] P.56f.; ch.XI.

divided.[1] The text of Bṛhaspati which provides for certain prohibitions not to alienate what is sādhāraṇam, is merely a moral prohibition and does not invalidate the actual sale.[2]

We may add that the discussion of alienability of the undivided share appears in a different chapter from that in which he treats the partition from that in which Śrīkṛṣṇa treats the partition of self-acquired and ancestral property by a father and in which he had precisely explains the power of the father in respect of alienations may be taken as a hint not to interpret the absolute power of the father too extensively.

V. The Right of the Widow without Male Issue to the Estate of her Husband.

Three generations of male descendants are entitled as heirs in preference of the widow, or daughter, or daughter's son. Baudhāyana's text which reflects a primarily agnatic kinship system, is the basic rule for succession.[3] Within this framework the widow of a collateral without male issue within three degrees was entitled to her husband's estate subject to limitation on her power of disposition.[4] After her death the estate would revert to the dāyādas of her husband in accordance with Kātyāyana's text.[5]

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[1] P.57f.; XI,7.

[2] P.58; XI, 1,8,9.

[3] See above,62f. Dābhā., tr. XI,i,31-36.

[4] Dābhā, tr.XI,i,43-65. On the "limited estate" see ibid., 56-65.

[5] Dabha, tr. XI,i,56f. Kāty.921. See above,122.

Jīmūtavāhana's concept of fractional ownership of the individual co-heir would permit a widow to succeed to the share of her husband consisting of moveable property or immoveable property, even if he died joint in status.[1] Raghunandana's view that the heirs became owners of their shares at partition would exclude the widow from inheriting her husband's property unless there had been a partition. There is no evidence in the Dāyatattva that a widow could succeed when the collaterals of the deceased were still joint.

The mother is protected by the rule that the father's property should be divided only after her death, or with her consent.[2] But if a partition took place during her lifetime an equal share must be given to her subject to the strīdhana she had received.[3]

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[1] Dābhā, tr. XI,i,7,14.

[2] Dā.bhā., tr. III, i,1-14.

[3] Dā.bhā., tr.III,ii,29-32. Strīdhana in the Dā.bhā. is the property of which a woman can freely dispose independently of her husband's control. IV,i,1ff.,18. Rege, The Law of Strīdhana..., 109,217-9.

Chapter VII

Vijñāneśvara's Mitākṣarā: Development and Synthesis.

I. The General Social Background. Vijñāneśvara's Definition of Sapiṇḍa and Dāya.

Vijñāneśvara (who is still the basic authority for joint family law in all territory administering the same) published his commentary on the Yājñavalkya-smṛti, the Ṛju-Mitākṣarā, between 1121 and 1125.[1] The popularity of Vijñāneśvara's commentary among subsequent authors - whether they refute or follow Vijñāneśvara in details - may be attributed to the fact that he more successfully than other authors reconciled divergent points of views and achieved to a certain extent a synthesis between the customs of different types of families.[2] The basic pattern of the law in Vijñāneśvara's exposition is set by the śāstric patrilineal, patriarchal family but within this framework other customs, prevalent in the territory where the author lived, could be accommodated to some extent.

We have indicated previously that in the South relations by marriage were highly valued due to repeated marriage bonds within the endogamous kinship group, established often

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[1] K.V. Rangaswami Aiyangar's introd. to Kṛtyakal., Dānakāṇḍa. 34-35. Cp. Kane, HDh, I, 287ff. See Derrett, JIH, 30 (1952) 35, 36f. on Vijñ. and his time. See also for the historical background to Vijñ.'s work, id., "Law and the Social Order before the Muhammadan Conquests", JESHO, 7(1964) 73-120.

[2] See Derrett, "A New Light on the Mitākṣarā as a Legal Authority," JIH, 30 (1952) 35-55.

by the practice of cross-cousin marriages. Prior to Vijñāneśvara legal writers had explained the concept of sapiṇḍaship with reference to the offerings of funeral oblations to agnatic ancestors and the agnatic bond of sapiṇḍa-relationship which "ceases at the seventh generation".[1] This suited the patrilineal, patriarchal family, but was not expressive of the customs of families who rated relations by marriage higher than distant agnatic heirs. One's own immediate family, comprising up to two or three generations and the families related by endogamous marriages would consider themselves united by kinship ties and would appear so to outsiders.[2] Vijñ. meets these customs and attitudes halfway in his definition of sapiṇḍa: "One ought to know that wherever the word sapiṇḍa is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent".[3]

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[1] Manu 5,60; see above, 57ff, 60ff. J.R.Gharpure, Sāpiṇḍya.

[2] A systematic search of inscriptional material would probably show various instances where a family and relations by marriage are viewed by outsiders as a unit and are affected as such as a whole by outside interference apart from acting as unit in many spheres. See e.g. E.I., XXI, No.27 (A.D.988) at 169-70: confiscation by king includes the property of two brothers (the culprits), their elder brother, younger brother and sons, of their wives, of the elder brothers of their father and their children, of their father-in-law, maternal uncles, sons-in-law. Cp.Derrett, JESHO, 7(1964) 73, at 113 and fn.2. See also Annual Rep. of Epigraphy (Madras), No. 112 of 1911. The close connection of a person with his son-in-law is evidenced frequently and actions directed against the father-in-law would affect him as well. See e.g. Ep.Carn., VI, Kd., 147. See also above for the illatom son, who was one of the customary sons-in-law often spoken of as an "adopted son".

[3] On Yājñ. 1,52; tr. Gharpure, Sāpiṇḍya, 72.

But his definition did not prevent Vijñāneśvara's disallowing marriages within the prohibited degrees of relationship.[1]

In the property sphere this concept of sapindaship is matched with the definition of dāya. Introducing the dāyabhāga section Vijñāneśvara gives the famous definition: tatra dāya-śabdena yad-dhanaṃ svāmi-sambandhād eva nimittād anyasya svaṃ bhavati tad ucyate/- "Here the term heritage (dāya) signifies that wealth which becomes the property of another, solely by reason of relation to the owner."[2] The mental picture emerging from this definition was of concentric circles of relations from the son to the king, having adhikāras in respect of any person's dhana.[3] By definition all relations have a right (adhikāra) in the property of a relation whether by blood or marriage whether males or females and - after perpetuating somewhat inconsistently the rule that agnates range before cognates (Yājñ.2,136) - the ultimate dāyādas, were the spiritual teacher, fellow-student, fellow-Brāhmaṇas and in case of the non-Brāhmaṇas, the king.[4] Vijñāneśvara uses a metaphor drawn from the law

[1] See comment on Yājñ. 1,52-3.

[2] 216; Colebrooke's tr., I,i,2.

[3] Derrett in ZVR, 64 (1962) 15, at 55.

[4] On Yājñ.2,135-6(238-46; II, i-viii.) For the background of Vijñ.'s definition see I.S. Pawate, Dāya-Vibhāga: or the Individualization of Communal Property and the Communalization of Individual Property in the Mitakshara Law.

of mortgages to classify and distinguish the varying grades of the relation's ownership in one's own property.[1] In the inner circle of relatives sons and grandsons have ownership in their father's and grandfather's property as apratibandha dāyādas or owners whose ownership is 'not accompanied by an obstruction' or 'permanently operative until satisfaction by partition'.[2] Vijñāneśvara ingeniously combined the notion of putratva, which made in the traditional patrilineal family the son and son's son the primary heir and most important family member with more than an expectancy to the father's property, with the customary right of control in respect of alienations by the father. The outer circle of relations are sapratibandha dāyādas, that is, they are owners whose ownership is 'dormant rather than contingent...and, while dormant not unreal, but merely ineffectual'.[3] Their ownership is 'accompanied with obstruction', the obstruction being the existence of an owner who has full control over his property or whose control is only subject to the rights

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[1] I.S. Pawate, op.cit., ch.3.

[2] The Subodhinī, a commentary on the Mitākṣarā includes the great-grandson. See Gharpure's ed., 43.

[3] Derrett, op.cit., ibid.

of the apratibandha dāyādas.[1] Thus an undivided family may consist of two types of dāyādas and ownership may be limited in two ways, e.g. A may have a son B whose full ownership is limited but who would gain a higher degree of control over the property on A's, his father's death, in preference to A's undivided brother C. C's ownership to the full estate was under two obstructions (sapratibandha dāya) namely the existence of A and B; at the death of A one of the obstructions ceased, though C did not gail full control thereby, as B stood in nearer relationship to A on account of his being an apratibandha dāyāda. When there are two persons who stand in the same degree of relationship to a person whose rights cease by death etc., they simultaneously share the control over the common property, the full enjoyment of the property being obstructed by their mutual existence. A partition (vibhāga) may make them exclusive owners of their share.[2]

[1] "It (dāya) is of two sorts: apratibandha or existing with no obstruction and sapratibandha existing along with one or more obstructions. The wealth of the father or of the paternal grandfather, becomes the property of his sons or of his grandsons; and that is a heritage existing with no obstruction. But it becomes the property of parents (v.l.: uncles) brothers and the rest, in the non-existence of the owner and the owner's son: and thus the existence of the owner's son and of the owner himself is an obstruction to the heritage and on their ceasing, it becomes the property (of a parent or an uncle or brother) by reason of his being a parent (v.l.: or uncle) or brother. It is therefore heritage existing with one or more obstructions. Similarly it should be understood in respect of their sons and the rest". Tr.follows Pawate's, 91.Cp.also Colebrooke's tr.I,i,2. The text is as follows(216): sa ca dvi-vidhaḥ - apratibandhaḥ, sapratibandhaśca/ tatra putrāṇāṁ pautrāṇāṁ ca putratvena pautratvena ca pitṛ-dhanaṃ pitāmaha-dhanaṃ ca svaṃ bhavatīty-pratibandho dāyaḥ/ pitravya-bhrātādīnāṁ tu putrābhāve svāmy-abhāve ca svaṃ bhavatīti putra sadbhāvaḥ svāmi-sadbhāvaśca pratibandhaḥ/ tad-abhāve pitṛ(vy)tvena bhrātṛtvena ca svaṃ bhavatīti sapratibandho dāyaḥ

[2] See below, .

We notice that Vijñāneśvara not only makes the sons apratibandha dāyādas, but selects as illustrations of saprati-bandha dāyādas not the widow or daughter, but near agnates like the brother and paternal uncle. In other words joint-ness of three generations of males would exclude the female's rights of inheritance. If a husband died joint with his collaterals the widow would have no right to the property of the husband including self-acquisitions, if any, because they are part of the common estate unless exempted at partition. This differs from the Aparārka in which, as we have suspected, the self-acquisitions of a brother go to his wife, though the brother may have died joint in respect of ancestral property.[1] Jointness between father and son and agnatic collaterals would also exclude the daughter, daughter's son or such near relatives as the son-in-law or the sister's son, and the maternal uncle, though they are in theory dāyādas and rank high in customary law.[2] In customary law, as we have seen, concurrent interests of parents, sons and daughters converged on the aggregate of property consisting of ancestral property, self-acquisitions and the

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[1] See above, 224 .

[2] See e.g. Ep.Carn., iii, Tirumakūḍlu Narsīpūr, 21(?1157): the property of those who die without sons, shall go to the elder brother, son-in-law, father-in-law, father's younger brother, father's elder brother, or their children. Ep.Carn., ix, Nelamangala 12, the son's property is taken possession of by elder and younger brother, his son-in-law and daughters.

strīdhanam (sīdanam) of the wife during jointness. Their right in dāya or samudāya, i.e. the aggregate consisting of property from various sources, was in fact simultaneously operative whether the property was self-acquired or ancestral, moveable or immoveable. The property was common property of all until the interests were satisfied by advancement in the case of sons and daughters and by partition after the father's death between the brothers and sisters and the mother. Vijñāneśvara does not negative in his definition of dāya that the wife becomes owner of her husband's property at marriage and the daughter by birth, as Aparāditya expressly held.[1] But Vijñāneśvara selected only the male descendants as apratibandha dāyādas, i.e. co-owners whose rights in their father's property and paternal grandfather's estate were operative, and he vested rights as well as responsibilities solely in the father and male descendants. By this process the right of the wife and the daughter were automatically placed under an obstruction; ~~and~~ the satisfaction of their maintenance interests in property was ~~thrust upon the father and his sons.~~ the responsibility of the males in the family

II. Acquisition of Dāya. The Relationship between Father, Son and Grandson.

(1) Ownership by birth.

In order to realize his concept of apratibandha dāyāda-

[1] See above, 222, 215.

ship of the sons, Vijñāneśvara supports the theory that ownership arises on birth. Vijñāneśvara refers to a text of Gautama which was sometimes to be believed spurious but which may in fact have been part of a less authoritative edition of Gautama[1]: "Let ownership be taken by birth; as the venerable teachers direct".[2] He holds the dictum of Gautama on the modes of acquisition[3] as illustrative and not exhausive. Riktha is interpreted as apratibandha dāya and saṃvibhāga as referring to sapratibandha dāya.[4] Property in the case of the son does not occur on partition or on the death of the owner nor is it an institution which is 'solely cognizable from the śāstra' (śāstraikādhigamya), as Dhāreśvara and his followers held. Acquisition of property is a matter of popular recognition according to the doctrine of the Mīmāṃsakas and consequently there can be no objection to birth as a mode of acquisition.[5] If it is said that

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[1] See Jolly, History of the Hindu Law of Partition, Inheritance and Adoption, TLL, 1883,110; contra Kane, HDh,III,557f. Cp.Derrett, BSOAS, 21(1958) 61ff,at 69f.

[2] I,i,23; p.218: uttpatyaivārtha-svāmitvaṃ labhetety-ācāryāḥ.. Cp.Medh., above 203 , who knew a similar text.

[3] riktha-kraya-saṃvibhāga... See above, 68 .

[4] 217; I,i,13.

[5] 217f.;I,i,8-16. See Derrett, JESHO, 1(1957) 66ff., on the foundation of Vijñāneśvara's doctrine and for text and transl. of the relevant passages of the philosophical disquisition.

theft is a mode of acquisition, which Medhātithi probably suggested to illustrate the necessity of the recognition of the śāstra,[1] the answer is that proprietary right in such a case is not recognized in popular usage and legal procedure.[2]

(2) Joint Ownership between Father and Son. Objections Refuted.

The criticism of Northern 'orthodox-śāstric' authors contained in the Mitākṣarā concerned the limitation of the patriarchal powers of the father which negative any legal rights of the son in the father's property before partition or death of the father. Vijñāneśvara considers the objection that, if property is created by birth in the case of the sons, a father could not use his own wealth for sacrificial rites according to Vedic requirements and would thus be incompetent to sacrifice (anadhikāra), because the estate would be common to father and son.[3] Viśvarūpa and Aparāditya had, as we have seen, referred the father inter alia to the possibility to acquire property of his own. Vijñāneśvara, however, is actually intent to establish the objection raised

[1] See above, 204 .

[2] 217; I,i,11.

[3] 218; I,i,17f.: idanīṁ-idaṃ sandihyate kiṃ vibhāgāt-svatvam-uta svasya sato vibhāga iti/ tatra vibhāgāt-svam iti tāvad-yuktam; jāta-putrasyādhāna vidhānāt/yadi janmanaiva svatvaṃ syāt-tadotpannasya putrasyāpi tat-svaṃ sādhāraṇam iti-dravya-sādhyeṣv-ādhānā◡diṣu pitur-anadhikāraḥ syāt/

by the opponents as a fact, namely the estate is indeed common to father and son. The son acquires by birth not only a right in ancestral grandpaternal property, but also in the father's self-acquired property whether moveable or immoveable. Vijñāneśvara skilfully combines two points of view. On the one hand he utilizes the northern tendency of styling all property in the hands of the father as the "father's property". Here the son's right amounted at the most to an equal share at partition. But the father might not divide the property at all. If he chose to divide he might also assign a share of his self-acquired property to make the partition complete. On the other hand Vijñāneśvara incorporates the customary interest of the son in respect of ancestral grandpaternal property, especially immoveable property, by giving that interest legal recognition.

The characteristic feature of the customary family was that sons would normally leave at marriage. Here the self-acquisitions of the father would be retained by him. His acquisitions in fact tended to be the common property of husband and wife and they might not be divisible by the sons until the mother's death or her remarriage. But according to Vijñāneśvara the self-acquisitions of the father are part of the common estate of father and son. This is a step in direction of further emphasis on a strict patrilineal family

with the result that the institution of community of ownership between the spouses recedes considerably in Vijñāneśvara's conception of the law. It is significant that he nowhere expressly mentions that property is common between husband and wife, a proposition taken seriously by Viśvarūpa, Medhātithi and Aparāditya. Vijñāneśvara could not admit common ownership between husband and wife in so many words, because this would be inconsistent with his theory of the son being an apratibandha dāyāda in respect of all his father's property.

Before we continue to state Vijñāneśvara's view we have to refer to two texts which are dealt with in this connection by medieval authors before Vijñāneśvara. One of the texts was that of Āpastamba which had expressly suggested that there can be no partition between husband and wife (jāyā-patyor na vibhāgo vidyate).[1] The other text is that of Yājñavalkya (2,115) which said that at a partition the wives to whom no strīdhana had been given by the husband or father, should be made equal sharers. Viśvarūpa on Yājñ, 2,52[2] simply held that there can be no partition between husband and wife and that Yājñavalkya's śloka emphasizes the fact that before partition there can be no mutual transactions between father and sons, and brothers.[3]

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[1] See above, 44 .

[2] See above, .

[3] On Yājñ, 2,52 (=2,54) [220f; Dh.K.721]: dampati-vacanaṃ cātra vibhāgāsaṃbhavād-anyeṣām api riktha-bhājām-avibhaktānāṃ sākṣyādy-abhāva-pradarśanārtham/

As long as the elementary family was favoured in the eyes of the law on equal basis with the patrilineal joint family there was no inconsistency between the institution of common ownership between husband and wife and śloka 2, 115 of Yājñavalkya, which refers obviously to a partition in a polygamous or a patrilineal joint family. In the polygamous or patrilineal joint family there would be no community of ownership between husband and wife, and the father and his male descendants tend to acquire property jointly. At a partition the wives and widows of sons and predeceased sons would receive a share to substitute strīdhana which they did not receive from their husband and father-in-law.[1]

On Yājñ. 2,52 Aparāditya holds that 'avibhakta' refers to brothers or father and sons, but does not include husband and wife. The wife is owner of her husband's property simply on account of her being his wife. Thus "property which is common between husband and wife cannot be divided".[2] The only property, we may say, which can be common to husband and wife, are the self-acquisitions of the father which he can exempt at partition[3], and his wife's dowry (sīdanam).

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[1] See Viśvarūpa on 2,115(i.e. 2,119) (242 ; Dh.K.1408b; 1409a).

[2] 654: atrāvibhakta-grahaṇaṃ bhrātṛ-viṣayam/ pitā-putra-viṣayaṃ vā/ na jāyā-pati-viṣayam/ na hi tayor-dhana-vibhāgo' sti, pati-dhane hi jāyā svāminī jāyātvād eva/ ato dampatyoḥ sādhāraṇaṃ dhanam-aśakyaṃ vibhaktum/ ata evā''pastambaḥ...

[3] See above, 170 .

If the sons remained joint with the father, the ancestral property belonged to father and son jointly; here his self-acquisitions could also not be styled 'common property between husband and wife'. Aparāditya also held that Yājñ. 2,115 refers to a polygamous household and we can say that in his eyes this text has nothing to do with common ownership of husband and spouses.[1]

To return to Vijñāneśvara's view that the son owns all property of the father. According to Viśvarūpa and Aparāditya the self-acquisitions of the father tended to serve solely his purposes and were the means for the performance of Vedic sacrifices which have to be performed with one's own property. In this respect there was rather common ownership between husband and wife than common ownership between father and son. But Vijñāneśvara holds that the self-acquisitions of the father belong simultaneously to father and sons.

Answering the objection that, because property is common between father and son, the father cannot use his own property for his religious duties prescribed by the Vedas and the Smṛtis, Vijñāneśvara says that by the cogency of the precept the father is invested with sufficient power to utilize property for such purposes![2] The northern authors whose

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[1] 719.

[2] I,i,26; t.219: yad-apy-artha sādhyeṣu vaidikeṣu karma svaanadhikāra iti, tatra tad-vidhāna-balād-evādhikāro gamyate/

opinions Vijñāneśvara records, would object that, if the whole estate were common to father and son, this would also be inconsistent with Smṛti-texts which allow a father to make gifts of affection from the moveable property to his wife or daughters, sisters and sons, in whose hands it would be exemptible at a partition.[1] Vijñāneśvara holds in answer that in accordance with the special provisions of the Smṛtis, moveable property whether self-acquired or acquired by the grandfather, are under the especial control of the father, though this does not alter the fact that the son acquires property by birth in all his father's and grandfather's property.[2]

(3) The Son's Rights to Control and the Concept of Pāratantrya

The relationship between father and son is based on the concept that though the son is svāmi, his svāmya is not necessarily accompanied by svātantrya, that is, the son is dependent on the management of the family property by the father. The father is not controlled by the sons as regards moveable property but he has to obtain their consent for the alienation of grandpaternal immoveable property and self-acquired immoveable property. Thus there is pāratantrya on the side of the father as well - a fact not expressed by Vijñāneśvara in so many words, because northern authors would

[1] I,i, 19-22.
[2] I,i, 23-4, 27.

have difficulty in conceding it.[1] Apprehension of northern śāstric authors must have been allayed to some extent by the provision of a Smṛti-text and the comment by Vijñāneśvara which gave wide managerial powers to the father and the eldest brother during jointness: "An exception to it follows: '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 especially for pious purposes'. [Vijñ. comments:] The meaning of that text is: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the <u>whole</u> family require it, or the support of the family render it necessary, or

[1] I,i,27; 219: tasmāt-paitṛke paitāmahe ca dravye janmanaiva svatvam, tathāpi pitur-āvaśyakeṣu dharma-kṛtyeṣu vācanikeṣu prasāda-dāna-kuṭumba-bharaṇāpad-vimokṣādiṣu ca sthāvara-vyatirikta-dravya-viniyoge svātantryam iti sthitam/ sthāvare tu svārjite pitrādi-prāpte ca putrādi-pāratantryaṃ eva; the text of Vyāsa follows 'sthāvaram dvipadaṃ caiva..' which is cit. in full above, Colebrooke translates "Therefore it is a settled point, that property in the paternal or ancestral (grandpaternal) estate is by birth, [Bālambhaṭṭa: although] the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, "Though immoveables or bipeds..."

indispensable duties, such as the obsequies of the father or the like, make it unavoidable."[1]

(4) The Periods of Partition, Mode of Partition, and the Son's Right to Demand Partition of Ancestral Assets.

Commenting on śl.2,114 of the Yājñavalkya-smṛti Vijñāneśvara specifies the periods of partition which are more or less in accordance with 'orthodox-śāstric' tradition. The periods are held to apply to self-acquired property of the father. Property is divided (a) by the father, with his will, (b) against his will when he is indifferent to wealth, is disinclined to pleasure and the mother is past child-bearing, (c) if the father is addicted to vice or afflicted with a lasting disease, even if the mother is not past child-bearing, and (d) after the death of the father.[2] The father could divide his self-acquired property amongst his sons equally or unequally according to the preferential shares (uddhāras#) prescribed by Manu and others.[3] But the ancestral wealth had to be divided equally and the father had no double share.[4] After the death of the father, the

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[1] I,i,28f.; 219: asyāpavādaḥ- 'eko'pi sthāvare kuryād-dānādhamana-vikrayam/ āpat-kāle kuṭumbārthe dharmārthe ca viśeṣataḥ//' iti/ asyārthaḥ - aprāpta-vyavahāreṣu putreṣu pautreṣu vā'nujñādānādāv-asamartheṣu bhrātṛṣu vā tathā-vidheṣv-avibhakteṣv-api sakala-kuṭumba-vyāpinyām-āpadi tat-poṣaṇe vā'vaśyaṃ kartavyeṣu ca pitṛ-śrāddhiṣu sthāvarasya dānādhamana-vikrayam eko'pi samarthaḥ kuryād iti/

[2] I,ii,7; 220.

[3] I,ii,4,13,14; iii,3-4.

[4] I,ii,6; iv,§.

brothers had to divide the property equally. The method of dividing the property with preferential shares had largely fallen into disuse and, as the Mitākṣarā says, "must not be practised, because it is abhorred by the world" (Loka-vidviṣṭatvānnānuṣṭeyaḥ).[1] The decay of the law of preferential shares may be attributed to the fact that the rules had become archaic and not applicable to a wide range of people amongst whom there was no reason to prefer any of the sons to such an extent as to let him have a special share in the hereditary property of the family unless the brothers consented to one of them having a larger share.[2] Especially among communities where ancestral property was highly valued and formed the natural provision of the descendants' marriages each brother would expect to be treated equally at a partition. A father, especially in communities where he was not the strong patriarch but rather a manager, could show his preference at the most by making gifts or unequal divisions of his self-acquired property. But any preference shown to a son by an unequal division of ancestral hereditary

[1] I,iii,4,7; 222f. Cp. Smṛti-saṃgraha, which also disowns the custom of uddhāra: ...tathoddhāra-vibhāgo'pi naiva saṃprati vartate// Dh.K.1194b. On smṛti rules rendered obsolete by relegation to a 'previous Age' of the Universe (kalivarjya) see Kane, HDh, III, ch.34. Id., Hindu Customs and Modern Law, v. 'kalivarjya'. Batuknath Bhattacharya, The 'Kalivarjyas' or Prohibitions in the 'Kali' Age, Calcutta, 1943.

[2] Cp. Viśvarūpa on Yajn. 2,118 (=2,117): atāṃ bhrātṛṇāṃ evecchayā vibhāga-vaiṣamyam/

property would cause endless jealousies and disputes. Not the least because the feeling that a relative's property was in a way also one's own, only equality observed at partition would mitigate mutual quarrels. Especially in respect of the ancestral property to which sentimental value and prestige value was attached, or in connection with a throne, quarrels would occur and the term dāyāda significantly often assumes the meaning of 'rival claimant'.[1] In the North the law of preferential shares was retained by Medhātithi who had - in connection with Manu's text on the preferential shares of brothers (9,112-3) - denied the view of authors that the rules do not find application. Their very presence in the Kṛtya-kalpataru shows that they must have been relevant alongside the simpler rules of equal shares. The arrangement of the texts by Lakṣmīdhara conveys the impression that the preferential treatment of a brother at a partition is based upon his special qualities and service to the father or family rather than on preferential shares predetermined in śāstric texts.[2] That a son had not only to be the eldest but also qualified to receive a preferential share[3]

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[1] G. Yazdani (ed.), The Early History of the Deccan, 480f. Indian Culture, II,410. See references cit. by Derrett at JIH, 30(1952) 35 at 42 fn22. Cp. above, 48f .

[2] Kṛtyakal., 655-65.

[3] See above, 136 .

is evidence of the decay of these low on preferential shares.[1]

(5) The Patrilineal Joint Family and the Customary Elementary Family according to the Juridicial Framework of the Mitākṣarā.

In the proemium to the dāyavibhāga part Vijñāneśvara expresses the legal recognition of joint ownership of father and son in respect of all property in the hands of the father. The self-acquisitions of the father are part of the common estate. Vijñāneśvara contemplates a patrilineal joint family though curtailing the patriarchal powers of the father considerably. One effect of this approach is the modification of the rights of the wife-mother-widow as occurring in the customary family, because even after partition between father and son, the son would remain owner of the father's property including acquisitions acquired subsequent to partition.[2] Self-acquisitions did not tend to be the joint acquisitions of husband and wife and were not as such exemptible at partition by the father; self-acquisitions of the

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[1]The jyeṣṭhāṃśa did not completely disappear in practice. See e.g. Hyderabad Arch. Ser. No. 5, Munirabad Stone Insit. of the 13th year of Tribhuvanamalla (Vikramāditya VI), A.D. 1088; line 29: the land donated included jyeṣṭhāṃśa (śa) da bhūmi.

[2]Subject to the rights of a son born subsequent to partition who would have the sole right to the father's property acquired subsequent to partition and the share of the ancestral property. See comment on Yāñj.2,122a (228; I,ii, 1-6).

father were not property which should be divided only after the death of father and mother as in the Aparārka[1]; with the establishment of joint ownership between father and son in respect of all the father's property, the marriage portion would be excluded and become the separate estate of the wife ab initio. The controlling powers of the son in respect of self-acquired immoveables of the father reflect the intention that if the son is desired to remain joint with the father and cooperate in the preservation and acquisition of property, he should have a right of control of the management of the father.[2] We thus also find a modification of the patriarchal śāstric-orthodox family foreshadowed in some of the Smṛtis, though we have to take into account that with the provision that the father is free to spend the property for religious purposes, Vijñāneśvara is in accord with northern authors. Similarly the 'periods of partition' can be interpreted as applying to the circumstances of a patriarchal joint family with the reservation that the father, if he divided the property, had to divide the ancestral property equally.[3] Vijñāneśvara also incidentally speaks of the

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[1] See above, 222 .

[2] See above, 271 .

[3] On Yājñ. 2,114 (220; I,ii, 1-6.)

'paternal estate' implying that all property is in principle the father's including the grandpaternal property.[1]

Besides the legal incidents of the patrilineal joint family we find incidents of the customary family in which the sons would normally, though not invariably, leave the family at marriage the ancestral property constituting the fund from which the marriages of the sons and the daughters were provided. Vijñāneśvara does not say that sons are normally advanced at marriage receiving a share of the ancestral property., but he holds that the son has a <u>right</u> to partition, so that he apparently suggests that jointness between father and sons or at least one of sons ought to be the basic legal and social pattern. The son's right to partition might have been a safeguard for the son to be utilised if the father mismanages the property.[2] While dis-

[1] On Yāñj.2,118 (224; I,iv,6-10,12,29).

[2] On Yāñj.2,121(227; I,v,3-11.) In spite of the excellent (dissenting) judgment of Telang,J., in <u>Apaji v. Ramchandra</u> (1892) 16 Bom.29 (F.B.) we are not convinced that Vijñ. wanted in fact to deal with the question of the right of the son to ask for partition of the grandfather's property in a case where the father is joint with his brothers or his father. The proemium to Yājñ.2,121(227;I,v,3) may equally plausibly be interpreted that <u>if</u> the father is <u>separate</u> from the grandfather and from his brothers the son has a right to ask for partition under certain circumstances. The solution may have depended, historically speaking, on the particular family system one had in mind. In the patrilineal joint family the son would obtain title through his father and if the brothers e.g. decided to remain joint it seems unlikely that a brother's son could disturb this arrangement. It would be different if one has the elementary family in mind where, however, one or more sons may remain joint at times. Here the son has a right to partition, especially when the father mismanages the property. This does not mean that once the son's right to partition had been admitted in Anglo-Hind law as absolute, his right to partition, if his father was joint with his brothers, would not follow. See below, 372ff.

cussing the son's right in ancestral grandpaternal property Vijñāneśvara does not restate the right to interdict the alienation of immoveable property self-acquired by the father, but on the contrary expressly says that the son has no right of interdiction and must acquiesce in a donation or sale, because the father is independent having a predominant interest in his own acquisitions. Perhaps this echoes the attitude found in the Aparārka and elsewhere to consider the father's self-acquisitions as primarily reserved for the father and his wife whose marriage portion would be a part of the common estate; this would leave the son in practice, if he remained joint, with a right of protest if the father alienated ancestral grandpaternal property.[1] That Vijñāneśvara also has in mind the elementary family besides the patrilineal joint family in his comment on Yājñ. 2,121 may be concluded from the fact that he speaks of the possibility of partition of ancestral property at the will of the son, even if the śāstric reasons of partition are not existing; also from the fact that he speaks of an undivided father a

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[1] See also the interpretation of śl.2,118 pitṛ-dravya..., which acc. to Vijñ. should be understood as mātr-pitror-dravya... and is meant to declare as impartible property which is earned 'without detriment to the property of the father and mother' which 'makes sense if the father's and mother's property formed a joint mass, indistinguishable until death or divorce'. Derrett, ZVR, 64 (1962), 15 at 62 fn.189.

phrase implying that a divided father is normal in the contemplation of this set of rules.[1] It seems preferable not to assume an inconsistency between (i) the rules allowing a right to interdict the alienation of the self-acquired immoveable property of the father and (ii) the right to interdict merely the alienation of ancestral property. Once Vijñāneśvara had established the apratibandha dāyāda-ship of the son checking thereby the rights of other dāyādas like the widow, daughter etc. and had on the other hand modified the law of the patriarchal family to suit the notion of joint ownership between father and son, both kinds of families merged and incidents of both might have become applicable in common.

III The Rights of Women.

(1) Strīdhana: Female's Property.

We have noted in chapter III that the text of Yājñavalkya on strīdhana[2] was differently read by medieval authors and that southern authors add to the categories of strīdhana the particle 'etc.' (-ādyam ca). Vijñāneśvara takes the position that all property acquired by a female in the manner

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[1] I,iv,8-9;227: tathā sarajaskāyāṁ mātari saspṛhe ca pitari vibhāgam-annichasy-api putrecchayā paitāmaha-dravya-vibhāgo bhavati/ tathā'vibhaktena pitrā paitāmahe dravye diyamāne vikrīyamāne vā pautrasya niṣedhe'py-adhikāraḥ, pitrārjite na tu niṣedhādhikāraḥ, tat-paratantratvāt/ anumatis tu kartavyā/

[2] 2,143-4 (250f.; II,xi,1-35, See above, 116 .

prescribed e.g. in Gautama's text such as inheritance, partition, purchase etc. is strīdhana and that in fact the term strīdhana conforms with its etymological connotation and has no technical meaning.[1] Vijñāneśvara does not refer to the texts of Kātyāyana which says that strīdhana is separate from the property of the husband and only available to him in an emergency (Kāty. 911-4); this indicates that in fact he leaves the question open because community of ownership between husband and wife was still a familiar phenomenon, strīdhana being the wife's interest in the joint property.[2] Other authors contemporaneous or posterior to Vijñāneśvara explicitly refer to the texts of Kātyāyana establishing that strīdhanam is not only separate from the claims of agnates of the husband but also available to the husband only in an emergency.[3]

Another question is whether a woman has full power of disposition over her strīdhana. Modern writers hold that the acquisition of strīdhana in the Mitākṣarā does also convey absolute power of disposal to the woman. This has been recently disputed at length by V.V. Deshpande.[4] But the

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[1] On Yājñ. 2,143-4(250; tr.II, xi, 1-4).

[2] Cp. also above his view on self-acquisitions, 287f.

[3] Kāty.911-4; Dā.bhā.,78; Sm.ca,656; Vya.ma. 286 etc. See Kane's fns. at text of Kāty.

[4] '"Stridhana", According to Mitakshara, Re-examined'. In: Studies of Law, Patna Law College Golden Jubilee Comm.Vol., 1961, 330-374.

discussion is based on the argument that Vijñāneśvara is "the foremost champion of the patrilineal family as the basic unit of Hindu social and domestic life" (p.337). This is true to a large extent, yet it represents an (orthodox-śāstric) interpretation of the Mitākṣarā viewed from the atmosphere of a patriarchal joint family. Vijñāneśvara allows, as we have tried to indicate, the existence of the customary elementary family where relations by marriage were valued highly and he allows the customs of communities, where women have far greater rights in property than in the patrilineal joint family in which a limited number of categories of strīdhana, a tendency to exclude women from inheriting the property of males, and mere maintenance, were prevalent, to conform to the śāstric law. At one place, while discussing the sonless widow's right to succeed to her husband's estate, Vijñāneśvara takes up the Smṛti-texts which speak of the pāratantrya of the woman, i.e. her dependence in respect of disposition of property and he exclaims: "let there be dependence, but where is the objection of accepting the right in property".[1] The true opinion of Vijñāneśvara seems to be therefore that pāratantrya of women is acceptable, but the solution of the question in which situation, in respect of which property, and amongst which communities dependence would apply is left to custom.

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[1] On Yājñ.2,135-6 -241; II,i,25:...tad-astu pāratantryaṃ, dhana-svīkāre tu ko virodhaḥ//

(2) The Interest of Women in Dāya as the Undivided Family Property.

According to the definition of dāya, the wife is a dāyāda in respect of her husband's property; this, implied, admission of the wife as a dāyāda in respect of her husband's property was not undisputed. We have seen that most authors had in spite of texts like that of Yājñavalkya (I,135) only admitted the sonless widow to inherit her husband's property under certain circumstances as Viśvarūpa, Dhāreśvara, etc. or subject to a limited estate as Jīmūtavāhana.[1] The concept of the woman as a dāyāda of her husband's property is reflected in customary law, but Vijñāneśvara neutralized to some extent the implication of his acceptance of the wife being a dāyāda with his theory that the son is apratibandha dāyāda of all the father's property. Even in customary law the widowed mother whose sons had been advanced might be left in possession of the father's self-acquired property (or rather their joint acquisitions) and other property in the possession of the father at his death, the extent of the claim of the mother varying considerably and depending on the custom of the area or caste. In the strict patrilineal family according to the śāstric texts the mother had merely a claim to maintenance and a moral claim that the partition of the property should be postponed until after her death. Vijñāneśvara settles the wife's interest in the

[1] See, 254f .

family property at partition between father and sons or sons separating after the death of the father by allowing her a share equal to that of a son subject, however, to the amount of strīdhana she had received. This seems to be an equitable solution, because if she has received already strīdhana from the property of the family she would ultimately receive more property that the son.[1] On the other hand Vijñāneśvara defends the right of the mother to a share against authors who would hold that she should receive only as much wealth as is sufficient for her maintenance.[2] Vijñāneśvara does not believe in interpreting Yājñavalkya to the effect that if the property is large the mother takes sufficient property for maintenance, but not a share equal to that of a son and that an equal share is only to be assigned if the property is small as Śrīkāra and other predecessors of Vijñāneśvara interpreted the texts referring to the mother's share.[3]

(3) The Sonless Widow's Right.

Though the wife is a dāyāda of her husband's estate according to Vijñāneśvara's opinion, jointless between father and sons and the agnatic collaterals of the father would

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[1] On Yājñ.2,123b (229; I,vii, 1+2).

[2] On Yājñ. 2,135-6(241;II,i,31-2); atha 'patnyaḥ kāryāḥ samāṃśikā' (Yājñ. 2,115) ity-atra 'mātāpy-aṃśaṃ haret' (Yājñ.2,123) ity atra ca jīvananopayuktam eva dhanaṃ strī haratīti matam [v.l.: strīdhanam iti matam], - tad-asat; 'aṃśa' śabdasya 'sama' śabdasya cānarthaKy-aprasaṅgāt/

[3] Ibid.

postpone her right to succeed.[1] The same result would be effected by reunion.[2] Vijñāneśvara in a similar but more coherent manner reconciles Smṛti-texts which lay down prima facie the sonless widow's right to inherit[3] and Smṛti-texts which prima facie excluded the widow from inheriting, originating in the atmosphere of the patrilineal patriarchal family.[4] He refutes medieval commentators who postulate that the widow should submit to niyoga.[5] He asserts that the woman is entitled in her own individual right and not through the husband and son and refers in this connection to the different kinds of strīdhana enumerated by Manu.[6] Maintenance is due to widows only during jointness which is sometimes effected by reunion; Smṛti-texts allowing the widow only maintenance have to be interpreted accordingly.[7] The school which held that Property exists only for Vedic sacrifice and that the widow is consequently disentitled to take the whole

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[1] On Yājñ.2,135(238-243; II,i,1-39).

[2] II,i,30; II,ix,1: "The author next propounds an exception to the maxim that the wife and certain other heirs succeed to the estate of one who dies leaving no male issue..."

[3] II,i,6; Vṛddha-Manu or Kāty.921; Viṣṇu 17,4; Kāty.926 (above) Bṛhaspati 25,87(210)

[4] II,i,7; Nārada 13,26-6 (above,), Manu 9,185(above,) and Kāty. 928.

[5] ; II,i,8-14. See above, 224 and fn.1.

[6] Ibid.(240; II,i,16): atha strīnāṁ pati-dvārako dhana-saṃbandhaḥ putra-dvārako va nānyatheti matam,- tad-apy-asat; ...(Manu 9,194) ityādi-virodhāt/

[7] Ibid. (240; II,i,19-20).

estate of a deceased husband, are refuted with the argument that if this theory were sound, then e.g. religious donations were not possible. Property serves purposes of artha and kāma as well[1], and if the term yajna, actually meaning Vedic sacrifice, is taken to connote religious duty in general, women succeed, since they are competent to perform works of purta, like the excavation of tanks.[2] Smṛti-texts which assign the heirless property (adāyādakam), with the exception of the property of a Brāhmaṇa, to the king by escheat, after the deduction of subsistence for 'women', apply to concubines (avaruddha-strī), because they use the word 'yoṣid' (females) and 'strī'.[3] But since Yājñavalkya uses the term 'patnī' which implies a woman who is married and is capable of joining her husband in the performance of sacrifices[4], these texts would not apply to a married and chaste wife. The conclusion at which Vijñāneśvara in face of the widely conflicting Smṛti-texts and of the welter of customs arrives, is, then, that a legally married wife, being chaste, takes the whole estate of a man, who, being separated and not

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[1]Ibid. (240;II,i,22)

[2]Ibid. (241; II,i,24):kiṃca yajña-śabdasya dharmopalakṣaṇa-paratve strīṇāṁ-api pūrta-dharmādhikārād-dhana-grahaṇaṃ yuktataram/

[3]Ibid. (241; II,i,27-8); Kāty.931 (see fns.), Nārada 13,52. These texts supply the foundation of the Anglo-Hindu law and modern Hindu law on concubines. See also Kane, HDh,III,600, 810ff. Jolly, Recht und Sitte, 64 f.

[4]II,i,5,29. See Pāṇini ४,1,33 for the derivation. Kane, HDh,III,707.

subsequently reunited dies leaving no male issue.[1]

IV. The Rights of the Daughter (Sister) and the Parents.

Aparāditya had acknowledged the daughter's right in the family property by reason of her birth. But he as well as Vijñāneśvara says that in the presence of brothers she is precluded and her claim in the dāya consists of marriage expenses and dowry amounting to a fourth part of the share which is allotted to a brother.[2] Whereas in customary law the share of a daughter might amount to a larger share than that of a brother, or is in any case flexible in size or larger than one fourth of the share of a son, Vijñāneśvara follows the Yājñavalkya-smṛti in settling the question. The brother's duty to arrange for the marriage of the sister is in accord with Vijnanesvara's concept of the son as apratibandha dāyāda which places the burden of family responsibilities towards the whole family in the hands of father and son. They have consequently joint ownership.[3]

After the daughter's son[4], the mother and father are in order dāyādas; the mother is probably selected as a dāyāda in preference of the father in view of polygamous

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[1]Ibid.[242f.; II,i,39]: tasmād-aputrasya svaryātasya vibhaktasyāsaṃsṛṣṭino dhanaṃ pariṇīta strī saṃyatā sakalam eva gṛhṇātīti sthitam/

[2]On Yājñ.2,124 b[239f.: I,vii,5-14].

[3]Ibid.[229;I,vii,6]: asyārthaḥ-bhāginyascasaṃskṛtāḥ-saṃskartavyā bhrātṛibhiḥ/

[4]On Yājñ.2,135-6, (243;II,ii,6).

families where the wives may be from sufficiently important families to entitle the mother in preference of the father or as Vijñāneśvara says, because "the father is a common parent to other sons; and since her propinquity is consequently the greatest, it is fit, that she should take the estate in the first instance..."[1] The authors from Bengal like Jīmūtavāhana and Raghunandana as well as most of the predecessors and followers of Vijñāneśvara held the father to be entitled in preference to the mother thus conforming more closely to the concept of the patrilineal and patriarchal family;[2] some early authors held that the parents take together, so for instance Śrīkāra.[3] The latter solution would be more in conformity with the institution of community of acquisition between husband and wife as it is reflected in the next dampatyor dhanam madhyagam.[4]

V. Partition, Exemption of Self-acquisitions, and Reunion.

(1) Exemption of Self-acquisitions.

The interesting passage in which Vijñāneśvara interprets Yājñavalkya's text (2,118; see above,170) on the exemption of self-acquisitions as presupposing that the property

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[1] Ibid. (243f.II,iii,1-5):... kiṃca pitā putrāntareṣv-api sādhāraṇaḥ; mātā tu na sādhāraṇīti pratyāsatty-atiśayāt 'anantaraḥ sapiṇḍād-yas-tasya tasya dhanam bhavet' (Manu 8, 187) iti vacanān-mātur eva prathamaṃ dhana-grahaṇaṃ yuktam/

[2] See texts cit. in transl.at Jha, HLS,II, 494-9.

[3] See fn. to tr.II,iii,5.

[4] See above,43ff..

which is exemptible has not been acquired 'with detriment to the father's and mother's estate' is explicable in terms of customary law where father's and mother's property formed an undifferentiated mass until death or divorce.[1] If the sons remained joint and property was divided only after the father's death (or parents' death) or during the lifetime of the mother, though with consideration of her rights in the joint estate, self-acquisitions could be exempted. But another feature of this type of family, at that time prevalent mainly in the South, is that only limited categories of property could be exempted by the brothers so that even gifts (pratigraha) were partible amongst the dāyādas.[2] In the following Vijñāneśvara speaks of 'self-acquisitions' not acquired to the detriment of the father's estate which is again in conformity with the patrilineal joint family where the wife's property would be separate from the estate of the agnates. But we may also

[1]Derrett, ZVR, 64(1962) 15 at 62 fn.189. Yājñ.2,118(224; I,iv,2): māta-pitror-dravyāvināśena yat-svayam-arjitam, maitraṃ mitra-sakāśād-yal-labdhaṃ, audhvāhikaṃ vivāha-labdhaṃ-dāyādānāṁ bhrātṛnāṁ tan na bhavet/- "That, which had been acquired by the coparcener himself without any detriment to the goods of his father or mother (or: and mother): or which has been received by him from a friend, or obtained by marriage, shall not appertain to the coheirs or brethren".

[2]Ibid. (224; tr.I,iv,6-9). By accepting a gift the acceptor would not only place his own person under an obligation but also the other dāyādas and the common estate. See e.g. M.N. Srinivas, Religion and Society amongst the Coorgs, 94. See in this connection also J.C. Heesterman, "Reflections on the Significance of the Dákṣiṇā", Indo-Iranian Journal, 3(1959) 240-58.

understand the phrase 'father's property' as typifying the joint property. Whenever Vijñāneśvara calls the common estate samudāya he probably implies that the wife's interest has become part of the common estate whereas the term sādhāraṇam which he also uses is more representative of the joint interests of father and son as understood by northern authors. On the other hand he also allows the impression that samudāya, interpreted in the light of the patrilineal family, does not include the wife's strīdhana, this constituting a separate estate, so that the terms samudāya and sādhāraṇam coalesced in so far as a common fund could exist only between father and son, or between agnatic relations.[1]

(2) Partition.

An eldest living ancestor may stay jointly with his sons and grandsons all having a joint interest in the aggregate of property. If he dies or one of the descendants dies there is strictly speaking no change in the ownership of the undivided members except that one of the ownerships has ceased. If a brother dies with male issue even his concurrent interest continued to exist as there is an identity of ownership between father, and sons of predeceased fathers take 'per stirpes' at partition.[2] The aggregate of property

[1]The term dravya-samudāya occurs e.g. in the proemium to Yājñ.2,114 216; I,i,4 and on Yājñ.2,126 where it is used synonymously with sādhāraṇam dravyam. See Derrett, Jour. Ind. Hist., 30(1952) 35 ff. at 46f.

[2]Yājñ.2,120 b(226f.; I,v,1-2): aneka-pitṛkāṇāṁ tu pitṛto bhāga-kalpanā//

is thus subject to deminutions and enlargements because of alienation by the father or eldest brother and acquisitions by family members, but the prospective portion of the property is also subject to the death and births of dāyādas, i.e. the creation and ceasing of ownerships. Partition or vibhāga is, therefore, an arrangement of these ownerships. Colebrooke translates: "Partition is the adjustment of diverse rights (svāmyāni) regarding the whole, by distributing them on particular portions of the aggregate".[1] Whereas for father and sons or brothers living jointly the term vibhāga implies division of the property amongst dāyādas whose ownerships are actually effective, the widow and daughter or other dāyādas have, according to the order prescribed by Yājñ.2,135-6, ownerships which are under obstruction. In the case of the widow and other heirs not belonging to the inner circle of apratibandha dāyādas or avibhakta dāyādas the term vibhāga is likewise applicable, though here it consists of the arrangement of property being the object of many ownerships, giving preference to some only of the many ownerships. Whose ownership is to be preferred and whose ownership is to remain under obstruction is to be decided according to propinquity.[2]

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[1] Proemium to Yājñ.2,114 (216; I,i,4).

[2] See I.S. Pawate, op.cit., ch.VII.

(3) Reunion.

We may summarize here some of the objects of reunion as evident from the treatment in early commentaries and the Mitākṣarā. Viśvarūpa had related Yājñavalkya's text regarding reunion[1] expressly to a previous partition according to mothers and held that uterine brothers whether divided or undivided succeed in preference to uterine half-brothers which shows that the property should remain in the hands of the immediate descendants of the mothers.[2] Medhātithi had explained the exclusion of the non-uterine half-brothers in preference of uterine brothers thus: "It may be seen that the characteristic feature of divided uterine brothers, even though they are far away from those who live jointly, is nearness which arises from their identity even though they are separate."[3] Aparāditya had introduced a commercial aspect in so far as the proportions of the joint family property or other property lumped together at reunion are

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[1] Yājñ. 2,139; see above, .

[2] On Yājñ. 2,138-9(=2,142-3) [;Dh.K.1546a,1547a]: sodarasya ca sodara ity-etat tu mātṛto vibhāga-pakṣe draṣṭavyaṃ, nirdhane ca pitari vibhaktaja-viṣayam/

[3] On Manu 9,211-2 (Dh.K.1544b): sodarya-vibhaktānāṁ saha vasatāṁ mahānikaṭam āvasaty-api sānnidhyaṃ viśeṣa-kārya sāmānyot-tha-vibhaktānām api vijñāyata.../ Cp.Jha's tr. V, 176.

taken into account at a new partition. But he, too, considers reunion as a qualification to the rule that sonless widow succeeds to the property of her husband.[1] The commercial incident does not recur in Vijñāneśvara's treatment of reunion and the exclusion of the sonless widow is one of the main objects.[2] Whereas a son born after partition would exclude a divided son from inheriting his father's property including the latter's self-acquisitions earned subsequently to partition[3], it is doubtful whether a divided son would take the estate of the father in preference to a reunited brother of the deceased. A separated son would have to reunite with his father to postpone the right of his widow and daughter, similarly a divided brother would have to reunite with his brother to achieve the same effect. We have a clear solution to the effect that separated brothers do not exclude the sonless widow.

The relations who could reunite are deduced from Bṛhaspati's text which is taken as exhaustive and not illustrative so that only brothers sons and their father, or uncles and nephews could reunite.[4] This corresponds also

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[1] See above, 212 .

[2] On Yājñ. 2,138 (247: II,ix,1): idānīṁ svaryātasya putrasya patny-ādayo dhana-bhāja ity-uktasyāpavādamāha/- "The author next propounds an exception to the maxim that the wife and certain other heirs succeed to the estate of one who dies leaving no male issue".

[3] Yājñ. 2,122a.

[4] On Yājñ.2,138a and Bṛhaspati 26,113 (see above fol) (248; II,ix,3): samsṛṣṭatvaṃ ca na yena kenāpi, kintu pitrā bhrātrā pitravyeṇa vā;...

to the persons which may normally hold the property as avibhakta dāyādas, and we are left to suppose that all relations who had not participated in the previous partition but had a residual interest, though it had been under an obstruction at the time of partition, could not have a right to reunite.

(4) Conclusions.

Vijñāneśvara's discussions reflect the desire to ascertain and to distinguish the various converging interests in the property of a person and to arrange them in order of priortiy by means of partition and reunion. The limited categories of property which could be exempted at partition and the strict interpretation of Bṛhasapti's text on reunion indicate to our mind that at the time of Vijñāneśvara the claims of family members constituted a strong pressure on the property acquired by a person. In this context we remember the son's claim to the father's self-acquired immoveable property which often would be the land received as a subsidy for learning and reward for loyalty and was most valuable for new brāhmaṇical immigrants from the North. The other feature of Vijñāneśvara's discussion in general and in respect of his treatment of partition and reunion is the tendency to prefer jointness of males, females being a sort of beneficiaries of this jointness with no corresponding responsibility.

Chapter VIII

Trends in Medieval Works after Vijñāneśvara

I. Vāradarāja's Vyavahāra-nirṇaya

This author, who composed the Vyavahāra-nirṇaya according to K.V.R. Aiyangar about 1225 A.D.[1] but wrote in any case much earlier than Devaṇabhaṭṭa, also adheres to the view that through relation to father and mother etc. one is an owner of their assets; therefore, what is already one's own is partitioned and Property does not arise from partition.[2] On the text of Hārīta: jīvati pitari... na svātantryam iti/[3], he commented: "Moreover if we take the view that Property arises prior to partition the term found in all Smṛtis, 'let him divide', fits; otherwise what ought to be said is, 'let him give to his sons', for there would be no Property (on the son's part) prior to partition. Similarly taking the view that Property arises on partition, an only son could not have Property because there will be no partition after the death of the parents". And he concludes: "Therefore merely by entering the kula there is indeed ownership on the part of the son in the property of the father and

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[1] Adyar Lib.ed., introd., liii-liv.

[2] P.413 (Dh.K.1180b): evaṃ pitṛ-mātṛ-sambandha-prabhṛti tad-dhaneṣu teṣāṃ tathā svāmitvam-astīti/ svasya sato vibhāgaḥ/ na vibhāgāt svatvam iti/

[3] See above, .

grandfather".[4] Recognition of svāmya (ownership) and svatva (Property) does, however, not necessarily diminish the patriarchal authority. In respect of self-acquired property of the father the partition takes place at the desire of the father, whereas ancestral property is to be divided by the will of the father and the son.[2] Though we are left to guess whether ancestral property may be divided at the sole will of the son or after father and son have come to an agreement, the times of partition which follow the traditional pattern[3] tend to confirm that Vāradarāja does not deem it feasible that the son should act unilaterally.

In Vāradarāja's work rather the patrilineal joint family than the nuclear family is emphasized. Sapiṇḍas are those agnates who live jointly and may comprise four generations. The relation who is removed five degrees from a particular sapiṇḍa would be excluded at a partition by those joint or reunited.[4] This conception is based on the texts of Baudhāyana[5] and Devala[6] which hardly allow any rights of

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[1]412: kiṃ ca pūrvam eva svatvam-utpannam ity-asmin pakṣe sarva-smṛtiṣu vibhajed iti yujyate/ anyathā vibhāgāt-pūrvaṃ svatvābhāve putrebhyo dadyād iti vaktavyam/ tathā vibhāgāt svatva-pakṣe eka-putrasya mātā-pitror-ūrdhvaṃ vibhāgābhāvāt svatvaṃ na syāt/ tena kula-praveśād eva pitṛ-paitāmahe dravye' pi putrasya svāmyam asty-eva//

[2]413: tena svayam-ārjite pitur-icchayā vibhāgaḥ ārjakasya prādhānyāt/ kramāgate tu pitur-icchayā putrecchayā ca vibhāgaḥ/

[3]408, 410, 412f.

[4]425, 454.

[5]See above, 62f.

[6]See above, 29f.

relations by marriage, and though the sonless widow is recognized as an heir she would inherit only if her husband died separate from his agnates within four degrees in ascent and descent.[1] To this we have apparently an alternative in so far as it is stated that the widow may utilize the gifts from her husband 'up to 2000' at her pleasure, whereas if she has received no gifts she may take from the estate only 2000.[2]

II. The Smṛti-candrikā of Devaṇabhaṭṭa.

(1) Definition of Dāya Rights of Wife-Widow-Mother. Rights of Daughter.

Devaṇabhaṭṭa, the author of the Smṛti-candrikā, who has written before 1225 A.D. and refers to Vijñāneśvara and Aparāditya,[3] is strongly against women having more rights in property than they would have in the traditional patrilineal joint family. He combats the definition of dāya given by Vijñāneśvara as the same would imply that the wife participates in the property of the males as a dāyāda, which, he says, is against the śruti dictum that women do not participate in dāya.[4] Devaṇa sets out to disprove that the woman in her capacity as mother or wife is entitled to a share at partition as a dāyāda; in his opinion she has only a right

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[1] 425, 450.

[2] 450.

[3] Kane, HDh. I, 345f.

[4] See above, 105f.

to maintenance. The term aṃśa in the text of the Yājñavalkya-smṛti[1] is not consistent with the proposition that women should get dāya, as aṃśa merely implies a 'share' and not dāya, the same way as members of a trading corporation may receive 'shares' which are not dāya.[2] In other words Devaṇa does not admit the concept of dāya where a widow inherits. The wife does not acquire a right in her husband's property by marriage which would entitle her to a full share as a dāyāda at a partition between father and sons or between sons after the father's death. What she acquires is merely a right to maintenance and in this light we have to understand Devaṇa's reference elsewhere to property belonging in common to husband and wife and property belonging exclusively to women.[3]

Devaṇa makes it clear that according to his view the mother does not take a share, if she possesses strīdhana which is sufficient for her maintenance and for religious performances to be observed by her. If she does not possess strīdhana she receives a share up to the amount necessary for her needs. Even if the property is very large, a mother or

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[1] 2,135; see above, 119f .

[2] Mys. ed., 623f.: bādhaṃ yujyate, dāyānarhāṇāṃ tu dāyāharit-voktir virudhyate, na punar-aṃśa-hāritvoktiḥ aṃśa-śabdo hi bhāga-vacano na dāya-vacanaḥ, gaṇa-dravyādāv-apy-aṃśo deya iti prayoga-darśanāt/

[3] On Manu 9,199 [654]: svatantrānanujñayā paratantrāḥ striyāḥ strī-puṃsa-sādhāraṇa-vittād ātmīya-vittād vā tyāga-bhogādikaṃ na kuryur ity-arthaḥ/

mothers receive only such share as is necessary to meet their needs.[1] The mention of an 'equal' share in Yājñavalkya's text serves only to debar the mother from claiming a larger share than that of a son, though she may be actually in need of it, when the estate to be divided is small. (624f. Gharpure's tr. 572.)

Vijñāneśvara's definition of dāya is disapproved by Devaṇa as it would imply that the wife's property is dāya and thus partible. This would go against the notion that there can be no partition between husband and wife. Thus also the property which the wife receives solely on account of her relationship to her husband from the husband in the form of a share at partition would be dāya. This would be against the śruti.[2]

Devaṇa perpetuates, as we shall see, the concept of common ownership between father and son in respect of all property. Property was held in the male line and women are confined to their strīdhana having beyond it only a right to maintenance. Their strīdhana is separate and not partible by the agnates, and as dāya implies partibility Devaṇa accordingly formulates his definition of dāya: "According to our opinion, however, property which is capable of partition and which becomes the property of another solely by

[1] 624.
[2] 623f.

reason of relationship to another is the meaning of the word dāya; wife's property which is not capable of partition is not dāya.[1]

The refusal to accept the wife's or mother's having a right beyond the necessary amount of maintenance does not prevent Devaṇa from admitting the widow to take the whole estate of her husband who died separated, unreunited, and sonless.[2] By marriage ownership of a dependent character is created for the wife in respect of the whole of her husband's estate; with the death of the husband the ownership becomes independent in character.[3] If these conditions are present, the Śruti-text 'tasmāt striyo nirindriyā adāyādiḥ' does not apply to the case of the patnī, i.e. a wife who is not purchased and is married in the approved form of marriage.[4] This would be in the case of the brāhma-marriage, but as most marriages in the South were performed in the unapproved forms of marriages, the right of the widow to succeed must have applied only to a limited number of communities.

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[1]624: asman mate tu vibhāgārhaṃ sva-svāmi-sambandhād eva nimittād anyasya svam jātaṃ dāya-śabdārtha iti vibhāgānarham patnī-svaṃ na dāyaḥ/ In the beginning of his treatment of dāyabhāga Devaṇa had already defined dāya with these words: vibhāgārha-pitrādi-dvārāgate dravye vṛddhā dāya-śabdam āhur ity-arthaḥ/- "The meaning the seniors declare by the word dāya is this: it is the wealth which came from the father and the like, and which admits of partition". Mys.ed.,597.

[2]672ff.,ch.on the succession of the sonless widow. Tr. I, 274-83 (XI,i,1-58.

[3]675: yady-api vivāhād eva pati-dhane kṛtsne patnyā api svāmyam ā jīvanāt pāratantratayā siddhaṃ, tathā'pi svatantratayā svāmitvāntaram labhyata ity...

[4]681; Gharpure's tr., 641.

The rights of the widow are further qualified by the requirements of chastity and piety[1], and where these requirements were not met, she would receive only maintenance from the agnates of her husband, even though the latter had died separate.[2]

A sonless widow is entitled to immoveable property only if she has a daughter and her husband was separate from his agnates, because immoveable property is said to constitute the means of subsistence for descendants (santāna-vṛtti).[3]

A widow (patnī) of a dāyāda who dies unseparated could be left in the possession of the self-acquired assets of her husband in consequence of her father-in-law, etc., not being able to maintain her or being engaged in other concerns. But she was entitled to maintenance from her father and other agnates of her husband provided they take the property of the deceased. It is expressly mentioned that the taking the wealth of the deceased (i.e. his self-acquisitions which he had not exempted at a partition) is the reason for maintaining the widow, in other words one should not accept the wealth of the deceased and omit the maintenance of the widow.[4]

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[1] 675; tr. I,276(XI,i,15-18).

[2] 680; tr. I,282 (XI,i,50).

[3] 676; I,278f. (XI,i,25-7).

[4] On Katy.921 (see above, . 677f.): tat avibhakta-daśāyām rakṣaṇa-bharaṇāsamartheṣu kāryāntara-vyagreṣu va śvaśurādiṣu patnyā svayam eva jīvanārtham upāttāvibhakta-dravya-viṣayam/.. rakṣaṇādi-samartheṣu śvaśurādiṣv-avibhakta-mṛta-dhana-grāhiṣu satsu tair eva grhīta-dhanair-bharaṇam kāryam/.. grāhiṇeti sarvatra jyeṣṭhādau śeṣo draṣṭavyaḥ/ dhana-grahaṇa-nimittitvāt bharaṇasya/

This means that the widow may be allowed to maintain herself from the acquisitions of her husband, though, of course, she could not be entitled as a dāyāda and her power of disposition was limited. This differs from the Dāyabhāga provisions where a widow receives-subject to a limited estate - her whole husband's share in the undivided property held by the brothers in quasi-severalty.[1] In the Smṛti-candrikā the father might still be joint with sons; the sons have ownership on account of their birth, and unlike the Dāyabhāga situation their ownerships extends over the whole property, until partition makes them exclusive owners of their respective shares.

(2) The Right of the Daughter and Parents as Heirs. Community of Ownership between Husband and Wife.

The daughter, though acknowledged to have a proprietary interest by birth, does not receive a share as dāya from her brothers, but only a share amounting to one fourth of that of a son in order to meet their marriage expenses.[2] The daughter as an heir of a person separated from his father and brothers might even inherit in the presence of the widow who does not possess the qualification of 'chastity' (vyabhicāritva).[3]

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[1] See above, 254,122.

[2] 625: janmanā labdha-svāmyasya... Gharpure's text reads janmanā svatvānvitasya...(268).

[3] 686 (I,287; XI,ii,21-7), vyabhicāritva, lit. 'going astray'.

In deviation from the Mitākṣarā Devaṇa holds that the father precedes the mother as an heir to the son.[1] The answer given by Devaṇa to the question why an order of precedence has to be stated is significant. Devaṇa quotes the unidentified author Śambhu who had denied the necessity to establish an order of precedence, referring to the community of property between husband and wife; Śambhu had said that whichever of the spouses would accept anything would take it for the benefit of both. But Devaṇa says that whatever is taken by the mother is taken for her own benefit as in the case of strīdhana and not for the joint benefit of both herself and her husband.[2] In other words we find here an instance of weakening of the elementary family where community of ownership between husband and wife would often in fact occur, a community which Devaṇa will not allow to interfere with his patrilineal set-up.

The text of Āpastamba which suggested that there can be no partition between husband and wife is disposed of by Devaṇa with the text of Yājñavalkya which speaks of wives

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[1] 687-9.

[2] 689: yat-tūktam śambhunā - 'madhyaka-dhanatvāt dampatyor yena kenacit gṛhyamāṇam ubhayārtham iti na viśeṣo vaktavyaḥ' iti, tad-ayuktam/ mātrā gṛhyamāṇam mātrārtham evādhyagnyādi-strīdhana-van nobhayārtham iti viśeṣo vaktavya eva/
See Setlur's tr., I,290.

receiving a share at partition.[1] On Yājñavalkya 2,52 which pre-Mitākṣarā had utilized to point to the institution of community of ownership between husband and wife and to stress that there can be no partition between husband and wife, he confines his comment to saying that the person advancing a loan must have been separated from the person receiving it.[2]

(3) The Rights of the Son, Grandson and Great-grandson.

The preference of the father over the mother is in consonance with the Dāyabhāga in common with which Devaṇa also has references to the spiritual benefit in matters of succession, thus e.g. when he expressly mentions the great-grandson as an heir because he is entitled to offer piṇḍa to the great-grandfather.[3] The opponent had objected that only the son and grandson were entitled by birth to the father's and grandfather's estate.[4] Devaṇa refers to the text of Devala which had enjoined that within four degrees the sakulyas are sapiṇḍas[5] and comments: "Among the undivided sakulyas, i.e. who are undivided in estate, and who are

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[1] Yājñ.2,115 [613]. See above, .

[2] On Yājñ. 2,52 [718]. See above, .

[3] 648; tr.I,254 (VIII,11).

[4] Ibid; tr.ibid.(VIII,10). See also 683f. where the daughter is said to confer benefits by means of her son who performs śrāddha.

[5] See above, 28f. .

kulyas of the original owner, but born in different lines, who lived together, i.e. who have resided together for a long time, partition extends to the fourth, i.e. from the original owner to the great-grandson.[1] We notice that patrilineal joint families comprising four generations are treated as a potentiality. The father could also separate some of the sons by giving them a share of the estate. These were then precluded from succession by the undivided sons. Post-partition debts incurred by the father are to be paid on the death of the father by the undivided sons who are alone entitled to the property of the father.[2]

Devaṇa accepts that the son (etc.) acquires the property of his father by birth, although he is asvatantra during the life-time of the father except when the usual causes cited in the Smṛtis justify a partition: (a) the father is 'decayed', (b) remotely absent, (c) afflicted with a lasting disease, (d) extremely old, (e) disturbed in intellect, (f) influenced by lasting wrath, (g) prodigal, (h) addicted to courses not warranted by law.

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[1] 648: avibhakta-vibhak#tānāṁ avibhakta-dhanānāṁ vibhinna-santati-jātānāṁ kuṭastha-kulyānāṁ bhūyaś-ciraṃ sahavasatām ā caturthāt kūṭastha-prapautra-paryantam/...

[2] 395:...yatra punaḥ pitrā saha vibhaktā avibhaktāśca putrās-santi, tatra yeṣāṁ vibhāgād-ūrdhvaṃ pitrā yad-ṛṇaṃ kṛtaṃ tat-tair-na deyam avibhakteṣu suteṣu satsu vibhaktānāṁ vibhāgataḥ pitṛ-dravyārhatvasyāpagatetvena mṛte pitari punaḥ pitṛ-dravyāgrahaṇāt/

These reasons justify a partition against the will of the father, but the son may also partition the property if the mother is past childbearing, the sisters are all married, and the temporal affections of the father have become extinct, and the father consents.[1]

In respect of ancestral property Devaṇa refers approvingly to a custom which disallows a father or other member of a kula to initiate a partition in respect of ancestral immoveable and other property or to sell or give it away without the consent of the dāyādas.[2]

The texts of Yājñavalkya and others on equal ownership between father and son amount to this, that each takes an equal share if partition takes place. Devaṇa, however, also accepts an interpretation of Yājñavalkya's text which would correlate, as we may suggest, the father's power to alienate grandfather's property with the right of the son to ask for partition; that is if the father would alienate ancestral property against the wish of the son and without a family purpose or other justifying reasons, the son would be entitled

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[1] 598 ff.

[2] On Kāty. 853[646; tr.I,252]:...loke kula-kramāyāte sthāvarādau na kaścit pitrādir api riktha-vibhāge, api-śabdāt vikrayādāv-api na prabhutām iyāt/ tena tatra dāyādānumatim-antareṇa na vibhāga-vikraya-dānāni kuryād iti tasyārthaḥ/ See also 645: kṣetraṃ tu akhila-dāyādānumatyā vibhajanīyam... "Land, however, is to be divided with the permission of all the dāyādas".

to ask for partition to safeguard his portion of the ancestral property.[1] Like Vijñāneśvara, Devaṇa holds that the son owns the grandpaternal as well as paternal property, i.e. the self-acquired property. In respect of the grandfather's property there is an identity of svāmya and svātantrya whereas as regards the father's property the father was - none of the causes of extinction of right listed above existing - wholly independent. Thus he refuses to accept Vijñāneśvara's view when he says that self-acquired property even if immoveable, may be alienated without the consent of the undivided members.[2] This may have motivated Devaṇa to omit the division of dāya into apratibandha and sapratibandha, because it had little meaning to say the son has ownership in ancestral as well as paternal property unaccompanied with obstruction, if he had no effective rights of interdiction in the paternal property as long as the father's powers subsist. Moreover once it was established by Devaṇa that the widow or mother was ādāyāda so as

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[1] 649: kecit - yathāśrutārthatām eva cāsya vacanasyāṅgīkurvanti/ tathāca pautramātrecchayā'pi pitāmahadhana-vibhāgo bhavati/ pitur-icchā-mātreṇa ca kramāyāta-dhana-dānādikaṃ na bhavati, tatra putrasyāpi svāmyabhidhānād ity-ahuḥ/ tad atrāpi grāhyaṃ, āñjasatvāt/- "Some however accept a literal significance of this [Yājñavalkya's] text and say that even at the desire of the grandson alone a partition may take place, and that at the mere wish of the father a gift etc. of the hereditarily descended property cannot take place; since an equal right of ownership of the grandson in such property has been stated - that may be accepted here also, as being reasonable". Gharpure's tr., 602.

[2] 447: evaṃ ca svārjitaṃ sthāvaram api saptādhikaṃ jñātyananujñātaṃ deyam/

not to be entitled to an actual share at partition, there was no need to refer to the concept of apratibandha dāyāda-ship of the son. Anglo-Hindu law followed Devaṇa in regard to females' shares; it ignored him with regard to interdiction until the case of Rao Balwant Singh v. Rani Kishori[1] when a de facto agreement was achieved.

It is in consonance with Devaṇa's approach that the interpretation of Gautama's text on the sources of acquisition of property differs from that in the Mitākṣarā.[2] Rikthaṭis ownership which originated in respect of the father's and others' wealth on account of birth. Vibhāga does not intend that the ownerships of any relations in the aggregate is arranged under the head of individuals whether these relations are apratibandha dāyādas or sapratibandha dāyādas; vibhāga simply produces exclusive ownership of the sons and other male descendants in respect of the father's (etc.) property.[3]

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[1](1898) 25 I.A. 54.

[2]See above, .

[3]603: rikthaṃ riktārjanaṃ pitrādi-dhane svāmitvāpādakaṃ putrādi-janmeti yāvat/ tathāca paitṛka-dhana-lābha-hetutvenoktaṃ gautamenaiva 'uttpatyaivartha-svāmitvaṃ labhety-ācāryāḥ' iti/ uttpattyaiva mātur-garbhe śarīrotpattyaivety-arthaḥ/ saṃvibhāgaḥ pitrādi-dhane viśeṣa-niṣṭha-svāmitva saṃpādako vibhāgaḥ/- Tr. I,217.

(4) Sapiṇḍaship and Marriage, Effects on the Rights of the Sonless Widow.

The emphasis which Devaṇa lays on the 'orthodox-śāstric' criteria for the right of the widow to succeed to the estate of her husband, reminds us that in many South Indian communities women enjoyed greater independence and that divorce and remarriage of widows were widely practised.[1] It might have been one of the aims of the author of the Smṛti-candrikā to preserve the identity and to emphasize certain aspects of the 'orthodox-śāstric' traditions in the face of widely varying customs which at the same time had to be fitted satisfactorily into the śāstric system. Such an aspect would be the patrilineal joint family where women are svatantra having merely a right of maintenance rather than a full share and having a qualified right to succeed to the sonless husband's estate, if he dies separate and unreunited. Another aspect is the insistence on the approved forms of marriage which would entitle her to succeed.

Devaṇa admits that the marriage with the maternal uncle's daughter is permissible, but only if the marriage takes place in the approved forms, i.e. especially in the brāhma-form. Only in the case of the brāhma-marriage does the sapiṇḍa-ship arise for the bride in her husband's family. In the gāndharva, and asura-marriage, the latter especially

[1] See e.g. the provisions in the Tesavaḷamai where remarriage is visualized as common.

common in South India, there is no gift of the bride and her sapiṇḍa-ship in her parental family would continue. Here the smṛti-texts prohibiting cross-cousin marriages would apply, if her son married his maternal uncle's daughter.[1] Such customary marriages moreover must have had effects in the property sphere, that is a maternal uncle might act to the prejudice of his own son's proprietary interest - who was the true representative and heir in the śāstric system - in favour of his sister's son, who was felt to be a close sapiṇḍa.[2] The purpose of the brāhma-marriage was thus to sever the sapiṇḍa-relationship and make the wife irrevocably a member of her husband's patrilineal kula. Devaṇa notes the objection of 'some' to the widow's right to succeed to her husband's estate because the estate is to be enjoyed by relations of the husband, which seems prejudiced if the widow inherits. Devaṇa obviates this objection but at the same time makes sure that the property should be spent for purposes beneficial to the husband under the guidance of the priest and guru of the husband's family.[3]

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[1] Cit. in Kṛtya-kal., introd.to Gṛhastha-kāṇḍa, 23 f.,fn.1. Devaṇa shares this opinion with Mādhavācārya.

[2] Cp. above, 32 .

[3] 675: etad-uktaṃ bhavati - sthāvareṇāpi sahitaṃ kṛtsnam aṃśaṃ ādāya dhana-sādhyaṃ stry-adhikāra-śrāddaḥ-pūrtādikaṃ dānādikaṃ ca patyur-ātmanaśca śreyas-sādhanaṃ karma-jātaṃ pati-pakṣīya-ṛtvig-ācāryādi-puras-saraṃ patnyā ghṛhīta-dhanānusāreṇa kāryam iti/ etañca yat-kaiśeid uktam - patnī-gṛhītaṃ dhanaṃ yogya-pati-pakṣā-bhogyaṃ dhanikānupakārakaṃ vṛthā yasyatīti na patnī pati-dhana-bhāginīti, tat asiddha-hetukatvād/-deyam/

III. The Parāśara-mādhavīya of Mādhavācārya

Mādhavācārya who composed the Parāśara-mādhavīya between 1330-1385 A.D.[1] adopts Vijñāneśvara's definition of dāya and his division of dāya into apratibandha and sapratibandha.[2] The son acquires ownership in his father's property by birth. Yet while the father is living the sons should not divide the wealth, as they are, on account of their dependence in respect of wealth and religious acts, incompetent to make a partition. Independence in wealth means independence in giving or receiving property.[3] Though the son has no right to ask for partition except in the usual cases where the father's rights cease, the father is nevertheless dependent on the consent of the son when he deals with the immoveable property, whether ancestral or self-acquired by the father.[4] The consent may be dispensed with in times of distress, for purposes of the family and

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[1] Kane, HDh, I,330.

[2] 478.

[3] 479 f.: yady-api janmānantaram eva putrāḥ pitṛ-dhane svāmitvaṃ pratipannāḥ tathāpi pitari jīvati tad-dhanaṃ na vibhajeran/ yato dharmārthayor-asvatantryād-vibhāga-kāraṇe' narhaḥ/ arthāsvātantryaṃ tad ādāna-pradānayor asvātantryam - iti/- See the text of Hārīta 'jīvati pitari...', cit. above, . arthādāna is explained as upabhoga, 'consumption of wealth', visarga as vyaya, 'expenditure', and ākṣepa as bhṛtyādeḥ śikṣārtham adhiksepadih, 'reprimanding etc. of servants etc. for the purpose of instruction.'

[4] 485: sthāvarādau tu svārjite'pi putrādi-pāratantryam eva... Mādhava, a Southerner, does not hesitate to call the father paratantra, a frankness which had no express sanction in the Smṛtis.

for religious purposes.[1] Thus property is common between father and son and the term pitṛ-dravyam in Manu's text on exemption of self-acquisitions typifies the undivided property.[2]

IV. Madana-ratna-pradīpa (Vyavahāra-vivekoddyota)

This work which was compiled under the patronage of king Madana-simha between 1375-1450 A.D. is an attempt to synthesize the views of the orthodox-śāstric school with the views proposed in the Mitākṣarā. The definition of dāya suggested by Vijñāneśvara the subdivision of dāya into apratibandha and sapratibandha is retained. Devala's dictum which expressly said that there is asvāmya in the case of the son as long as the father is nirdoṣe - without fault - is looked upon as merely expressing 'dependence' (pāratantrya) an explanation of the dictum which is maintained by most authors of the Mitākṣarā school. Once more it is made clear that ownership exists in the father's as well as in grand-paternal wealth.[3] But the question whether the son's right is based upon sastric authority or on the secularity of property is resolved with a compromise which shows that the Mitākṣarā view that property can be acquired by popularly

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[1] Ibid.

[2] 558: pitṛ-grahaṇam-avibhaktopalakṣaṇārtham/

[3] 323: tatrāsvāmyam-asvātantryam ity-artha'vaseyaḥ saty api nirdoṣe pitari-putrapautrāṇāṁ janmanā ārabhyaiva pitṛ-pitāmahadhane svāmitvasya loka-siddhatvāt/

recognized means was not completely victorious: though ownership is a secular institution, the cognizability of the relationship between property and owner can be deduced from the śāstra.[1] Riktha is described as apratibandha dāya and saṃvibhāga as sapratibandha dāya. This is in accordance with the Mitākṣarā, but it is significantly added: "It is to be understood that the cause of property is birth in the case of apratibandha dāya, whereas in the case of sapratibandha dāya it is essentially the disappearance of the obstruction". Vijñāneśvara had implied that the right of the sapratibandha dāyādas are ineffectual and dormant, but the author of the Madana-ratna-pradīpa makes it clear that before the removal of the barrier by partition or death, the rights of the sapratibandha dāyādas are non-existent for practical purposes.

(2) The Rights of the Apratibandha Dāyādas.

The times of partition are in accord with the śāstric precedents and there is no indication that the son may divide against the father's will unless one of the reasons entitling a son to ask for partition is present. One may ask to what the rights of the sons amount. The authors of this work consider this not as a matter to be discussed in the chapter which deals primarily with partition of dāya. A right of the son not being given we find that the rights

[1] 323.

to prevent alienations by the father are discussed in the chapter on dattāpradānikam. This is following the example of the Smṛtis, whereas Vijñāneśvara, as we have seen, brings the discussion in the chapter on dāyabhāga. The text 'divided or undivided, sapiṇḍas are equal in regard to immoveable property. No individual among them has the power to give away, or mortgage or sell it' refers in the opinion of the author to ancestral immoveables, presupposes only prima facie the necessity of consent, and serves in fact as an argument a fortiori: "Divided coparcerners even are equal, how much more undivided coparcerners? The employment of the word 'divided' is for the sake of the rule 'how much more?', but does not purport to confer ownership to the divided. The uselessness of partition would be the result".[1]

As regards self-acquired immoveables and slaves etc. we find again the rule of the Mitākṣarā, i.e. they can only be alienated with consent of the adult sons.[2]

In the text attributed to Vyāsa[3] is explained with the a fortiori rule; the first śloka is corroborated by the

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[1] 210: 'vibhaktā avibhaktā vā sapiṇḍāḥ sthāvare samāḥ/ eko hy-anīśaḥ sarvatra dānādhamana-vikraye//' vibkaktā 'pi sthāvare samāḥ kimutāvibhaktā iti kaimutika-nyāya-pradarśanārthaṃ vibhakta-grahaṇaṃ na tu vibhaktānāṃ tatra svāmitvam astīti pratipādanārtham/ vibhāgasya vaiyarthyāpatteḥ/

[2] svārjitam api sthāvaram dāsādikaṃ ca putreṣu prāpta-vyavahāreṣu tad anumatyaiva dātavyam/

[3] "Immoveable property, and bipeds, even though self-acquired shall not be given nor sold without the consent of the sons. - Those who are born, those that are unborn, those that are in the womb - all these require livelihood and there shall be no gift nor sale". See above, .

second.[1] The exceptional powers of the father to alienate immoveable property are clearly defined: "In emergency conditions for the nourishment of the family, for the necessary śrāddha ceremonies of the deceased forefather, for the proper performance of the marriage of the unmarried girls, and for religious purposes, a gift etc. of the ancestral immoveables may be made even without the consent of sons and brothers etc."[2]

V. The Sarasvatī-vilāsa of Pratāparudradeva

(1) Definition of Dāya. Partition. The Right of the Widow.

The Sarasvatī-vilāsa was composed in the first quarter of the 16th century according to MM P.V. Kane[3] Dāya is defined as 'a thing common to father and son' and 'a thing belonging to the father which is fit for partition':[4] The author quotes a text by Bṛhaspati which is only found in his work and according to which dāya is derived from the

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[1] Ibid.

[2] Ibid.: āpat-kāle kuṭumba-poṣaṇārtham āvaśyaka-pitṛ-śrāddhādharya- (or -pathya-, another var. lect.: -śrāddhāryarthaya-) kanyā-vivāhādi-dharma-kāryārtham putra-bhrātrādy-anumatir-ahito'pi kramāgata-sthāvara-dānādikaṃ kuryāt/

[3] HDh, I, 413.

[4] Paras. 5;8: dāyo nāma pitā putra-samudāya-dravyam/ vibhaktavyaṃ pitṛ-dravyaṃ dāyam-āhur-manīṣiṇa iti smṛteḥ// vibhaktavyaṃ vibhāgārhaṃ//... vibhāgārhaṃ pitṛ-dravyaṃ dāyam-iti//

root dā = 'to give'.[1]

Pratāparudradeva thinks of dāya as covering both religious as well as secular inheritance, i.e. with the division of dāya = 'property', the separate performance of religious acts, e.g. the maintenance of a separate housefire and the separate performance of religious acts like the performance of the five great sacrifices of a householder (pañca-mahāyajñas), and the śrāddha-ceremonies are effected. In the case of persons who are very poor a separation of religious duties or acts takes place, and the separation is effected by mere declaration of intention. In the case of people with wealth the division of religious duties follows the division of wealth.[2] The author of the Sarasvatī-vilāsa frequently refers to Bhāruci, a pre-Vijñāneśvara writer who had already examined a definition of dāya similar to that which was later adopted by Vijñāneśvara - in spite or because of its implications. Bhāruci declined to accept the implications which made it appear as if women could be dāyādas,

[1]Para.6. Bṛh.26,1(195): dadāti dīyate pitrā putrebhyas-svasya yad-dhanam/ tad dāyam iti// "He gives; that property of his own which is given by a father to his son is dāya". He explains: "The nominative case of the word 'father' is to be understood, - That property which a father gives to his son." Thus the word Dāya has an objective derivation; and by this, its general definition is, that Dāya is that kind of property which is common to father and son."

[2]Paras. 8ff., 18,22ff.

which was against śruti.[1] Pratāparudradeva discussed the question whether the term dāya can be formally applied to the term strīdhana and he confirms the attitude of the author of the Smṛti-saṃgraha: "...that wealth which is obtained through the father and the wealth which is obtained through the mother, may be both spoken of by the term dāya".[2] According to the northern school, represented e.g. by Dhāreśvara[3], a widow of a man who died separated and sonless could inherit the property of her husband only if she submitted to niyoga, otherwise she was to get maintenance. But the Sarasvatī-vilāsa does not go so far and allows in such a case the widow who is a dharma-patnī, i.e. married according to the brāhma form of marriage, as an heir on account of her nearer propinquity with the husband.[4]

This is in accord with the provisions in the Smṛti-candrikā which the Sarasvatī-vilāsa generally follows closely in the matter of rights of women. Thus the share of women at partition is not characterised by enjoyerness of dāya (na dāya-bhaktvam) but is merely meant for their maintenance and necessary religious performances.[5]

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[1] Paras. 19-21.
[2] Paras. 21, 33ff., 37.
[3] See above, 224 ; cit.in Vīramitrodaya, 633.
[4] Paras. 399, 478-539.
[5] Paras. 114-6.

(2) The Rights of the Sons.

The right of the sons to ask for partition of the ancestral property even against the will of the father is admitted[1], though again the impression arises that through the intensive discussion of the traditional reasons of partition earlier, the right of the son is not absolute and that the orthodox reasons are accepted as the normal and ideal causes of partition. If the father proceeds to dispose of his self-acquired property the son cannot interdict.[2] In respect of the paternal grandfather's property the son has a right to interdict the alienation, and the right to ask for partition merely lends, in our view, emphasis to this right.[3]

VI. Mitra Miśra's Vīramitrodaya-vyavahāraprakāśa.

(1) Definition of Dāya.

Mitra Miśra's literary activity has been placed by MM P.V. Kane between 1610 and 1640 A.D.[4] In the dāyabhāga section of the Vyavahāra-prakāśa he summarizes the views of preceding authors on the meaning of dāya, svatva, and svāmitva, and defends the position of the Mitākṣarā school against the doctrine of the followers of the Dāyabhāga. In the course of his discussions he modifies the Mitākṣarā system.

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[1]Para. 220.

[2]Paras.221 f.: pitrārjite tu na niṣedhādhikāraḥ/ tat-pāratantratvāt// anumatis-tu kartavyā)

[3]Para.222: ...paitāmahe tu dvayos-svāmyam-aviśiṣṭam iti niṣedhādhikāro'py-astīti viśeṣaḥ//

[4]HDh, I,446.

We have referred to Mitra Miśra's objections to Jīmūtavāhana's etymological derivation of dāya.[1] Mitra Miśra's definition follows its precedent in the Mitākṣarā.[2] The definition is extended with reference to the dictum of the Nighaṇṭu which says: "The property of the father which is to be divided, the sages call heritage".[3] Mitra Miśra tells us that the word 'father' refers to any relation. Vibhaktavyam (to be divided) is explained as vibhāgārham = 'capable of partition', i.e. it is not necessarily to be divided thus covering the case of an only son.[4] Dāya is of two types: apratibandha and sapratibandha.[5] In another work of his, Mitra Miśra had defined dāya as dhanaṃ svāmi-sambandhavaśāl-labdha-dhanam: "dāya is the property which is acquired by way of relationship to the owner".[6]

(2) The Relationship between Father and Son. Putratva.

The Effect of Partition.

The author refutes the objections of predecessors who were against the notion of common right between father and

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[1] See above, 233 .

[2] 411: dāya-śabdaścayam svāmi-sambandha-mātrādy-atra dravye svatvaṃ tad-rūḍhya vadati/- "The term "heritage" again, is said to be applied to the property to which (one's) right accrues solely by reason of (his) relation to the owner." Setlur's tr. II, 275 (Ch.I.,2.).

[3] Ibid.: vibhaktavyam pitṛ-dravyaṃ dāyam āhur-manīṣiṇaḥ/

[4] Ibid.: tr.I,275f.(1,3).

[5] 412; tr.II,276 (1,5).

[6] Commentary called Vīramitrodaya, on Yājñ.2,114, p.568.

son and who pleaded for the right of the son as accruing on the extinction of the rights of the father so that dāya is obstructed - the existence of the father forming an obstruction.[1] We have already referred to one of the arguments directed against the notion of common ownership, namely that the śruti prescribes the establishment of a sacred fire with one's own wealth as soon as a son is born. Another argument is the rule of the impartibility of gifts to a son by a father which would be unreasonable as a gift requires the consent of all sons. The prohibition therefore would be superfluous, as what has been given by the father with consent of the sons has been given ~~to~~ by all.[2]

Mitra Miśra answers these objections in the following way: if only on the extinction of the right of the father the right accrues to the son, the sons would be incompetent to perform the ceremonies enjoined by the Vedas which can be performed only with one's own wealth, and the same conflict with the passage of the śruti would arise, the injunction of the śruti being applicable even if the father is alive. Permission to sacrifice, given by the father to the son or vice versa by the son to the father, does not generate property. The competence arises out of the fact that both have ownership, in the case of the sons permission

[1] Tr. II, 277 (1,6).
[2] I,277 (I,7).

being required, whereas, in the case of the father, on account of his independence no such permission is required.[1]

The second objection is refuted with the reference that one can assume the son's permission and these texts only establish the invalidity of the affectionate gift of immoveable property. Or one can say gifts other than immoveables may be given by the father without the permission of the son by reason of his independence.[2]

On a text of Śaṅkha-Likhita another dispute had arisen. The text runs: "The sons shall not divide the riktha while the father is alive; although ownership is subsequently acquired by them, the sons are certainly incompetent by reason of the absence of independence".[3] Various interpretations had been offered by predecessors of Mitra Miśra. Devaṇa had explained it thus: the sons - though acquiring the property of the father (pitṛ-dhanam) immediately after their birth - shall not divide the paternal estate except at his desire. As they have no independent wealth and religious duties, the sons are incompetent to make a partition.[4]

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[1] 418; II, 284f. (ch.I, 23f.).

[2] 418; tr.I, 286 (ch.I, 28f.).

[3] Tr.II, 279 (ch.I,11.). 414: na jīvati pitari putrā riktham bhajeran/ yady-api svāmyam paścād-adhigatam tair anarhā eva putrā artha-dharmayor-asvātantryād iti/

[4] Ibid.

A different interpretation was ascribed to the Kalpataru: "Although ownership is subsequently acquired in the wealth gained by the sons through learning etc. without making use of the paternal property, still by reason of the independence during the lifetime of the father in respect of property and religious duties, there is no absolute ownership even in the property acquired, - then what ownership can there be in the father's estate"?[1]

Mitra Miśra prefers the interpretation submitted by Devaṇa. His argument for his choice does not seem very strong, but is understandable, if it is understood that 'cumbersomeness' in śāstric interpretations tends to destroy the value of an argument. The interpretation given in the text ascribed in the Kalpataru makes it in his opinion necessary to infer many terms (bhūyaḥ-padādhyāhāraḥ) like "acquired by learning etc." whereas according to the interpretation of the Smṛti-candrikā which imports the term "birth" only, one has to infer less terms (alpādhyāhāraḥ). Moreover "birth" is suggested by its connection with sons.[2]

Nevertheless the fact that Mitra Miśra has to tackle such arguments shows how far the views of the Dāyābhaga school had gained influence according to whom the father may even retain two shares of the self-acquisitions of the

[1] Tr. II, 279; ch.I,11.

[2] 418; tr.II, 285 (ch.I,26.).

son.[1] Mitra Miśra holds that because the father acquires the son and the property there is no obstacle of taking two shares of his own acquisitions.[2]

Mitra Miśra defends the concept of common ownership between father and son and does not seem to reject that the son does not 'own' the self-acquired property of the father, as MM P.V. Kane suggests in his notes on the edition of the Vyavahāra-mayūkha.[3] On the other hand Mitra Miśra tries to mitigate the direct import of the text which prohibits the alienation of self-acquired property by the father and merely uses it as an a fortiori argument for the necessity of consent by the sons when the father alienates immoveable ancestral property.[4]

Nor does Mitra Miśra accept Jīmūtavāhana's theory of 'factum valet' for validating the alienation of immoveable property by one undivided brother (or by the father) without the consent of the dāyādas except in the cases specified by texts: it would be a mistake to see a spiritual object in a rule of positive law, if the rule is directed to 'seen' (dṛṣṭa, secular or rational) and not to 'unseen' (adṛṣṭa, spiritual) objects. If the rule were only to entail the

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[1] Colebrooke's tr. II,65-6. 71-2; II,46 (read: competent to sell, give, or abandon the 'son' not 'property').

[2] 444, 447; tr. II, 321f., 325f.

[3] At p.23.

[4] 458: yady-api svayam-arjitam ity-anena paitāmahe kaimutika-nyāyena putrānumatyāvaśyakatā pradarśitā/

moral offence of distressing the family, as Jīmūtavāhana maintains, then even in the case where all dāyādas consent, the objection of distressing the family could arise.[1]

The Vīramitrodaya covers much space to work out the relationship between father and sons and further male descendants. The ancient notion of putratva which implies that the son inherits or is charged with the duties and obligations of the father is combined with incidents of the rights of the sons as laid down in the Mitākṣarā. The cause of ownership in respect of father's and grandfather's property is putratva rather than mere birth. This would affect the concept of partition and make partition between father and sons sui generis. Thus Mitra Miśra refers to the text of Hārīta which suggested to our mind that even after partition - or rather advancement - the mutual rights of father and son subsisted.[2] A son may be disqualified because of excommunication or physical and psychical causes, but his ownership is not affected by partition or reunion. The reason is, we may say, that the sons are primarily and in preference to all other family members, especially the widow, qualified to be entrusted with ownership of the father's property with all rights and duties flowing therefrom.[3]

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[1] 460; tr.II, 341 (ch.II,22).

[2] See above, 139, 154. 540: ...Hārītena ca vibhāgottaram api pitrā-putrayoḥ paraspara-dhanādhikāra-pratipādanāc-ca/

[3] Ibid.: kiñca pitrādi-dravye-svāmye putratvādikam evāpatitatvādi-viśiṣṭam prayojakam na tu saṃsṛṣṭatva viśiṣṭam api gauravāt/ Tr. II, 437 (IV,12).

Thus even if all the sons are separated and not reunited the wife would not succeed. If only some of the sons are separate and others remained joint all would succeed jointly.[1] This is only qualified by the rule of Bṛhaspati relating to the son born after partition who would then, together with the sons who remained joint, debar the separated sons from succeeding.[2] This differs from the position in the Smṛti-candrikā, where partition extinguished the right of the separated son in the presence of unseparated sons.[3] Because of the overriding effect of putratva a separated son had to pay the post-partition debts of the father even out of his own property in the absence of paternal property.[4]

(3) Rights of the Undivided Dāyādas. Effects of a Partition between Collaterals.

Mitra Miśra defends the conception of common rights of undivided brothers over the estate which was disputed by most of the followers of Jīmūtavāhana who maintained that undivided brothers held separate rights over the estate.

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[1] Ibid.: tacca sarveṣāṁ saṃsṛṣṭānāṁ-asaṃsṛṣṭānāṁ ca tulyam iti sarveṣāṁ eva putrādīnāṁ viśeṣeṇa tad-dhana-grahaṇam-ucitam/ na ca vibhāgena pitrādi-dravyārhatvāpagamaḥ sarveṣu putreṣu vibhaktāsaṃsṛṣṭeṣu-putravad-bhāryyādīnām eva tatra dhanādhikārāpatteḥ/

[2] Ibid.

[3] See above, 156 fn. 2. The consequence was that the separated son would be free from paying the post-partition debts of the father.

[4] Kāty. 559 [266]: vibhaktaḥ putro vibhāgānantaraṃ pitṛ-kṛte ṛṇe tiṣṭhati tasmin-mṛte tad-dhanaṃ na gṛhṇīyāt kiṃ tu dhanikāya dadyāt/ yadi kiñcit tato'viśiṣṭaṃ bhavati tarhi gṛhṇīyāt/ pitṛ-dhanābhāve riktha-grahaṇarāhitye'pi sva-dhanam dadyād ity-arthaḥ/

Mitra Miśra does not follow the view that 'ownership' (svāmya) inheres in the owners jointly nor that 'property' (svatva) inheres in the whole estate and is determined by the owners. His proposition is that rights (properties and ownerships) exist separately in each dāyāda by reason of the sameness of relation: "When partition takes place amongst dāyādas, the right of each ceases to the extent of that which is allotted to the co-owners, the same way as in the case of death, retirement etc."[1] According to Mitra Miśra this is the meaning of 'vyavasthāpanam' = 'adjustment' in the Mitākṣarā.[2] If this were not the case one would speak of the production of right to a specific portion, but it is not the production of a different right which is to be assumed.

According to Jīmūtavāhana the svatva of a co-owner is not ascertained before partition; thus there is actually no possibility of making use of the property, because one does not know which property is one's own. Mitra Miśra does not accept the concept of fractional ownership before partition which would justify the co-owner to alienate his undivided share as such without the consent of the other co-owners. He follows Raghunandana in maintaining that the property of each co-owner accrues to the whole estate, but

[1] 431: praty-eka-vṛttīni saṃbandhāviśeṣāt svatvāni svāmyāni ca.../ Tr.I, 305; ch.I,57. See Raghunandana, above, .

[2] See above, 269 .

does not follow him, as we have seen, in saying that Property is replaced by a set of different properties at partition. Neither does he accept the solution offered by the author of the Svatva-vicāra who said that pre-existing property was replaced by different properties with retrospective effect.[1]

Mitra Miśra's conception of partition differs from Vijñāneśvara's in so far as the latter makes it appear that in the share allotted to a co-owner at a partition, svāmya of the other co-heirs continues to exist, though it becomes ineffectual ownership 'accompanied with an obstruction', whereas according to Mitra Miśra ownership as such ceases.[2]

(4) Mothers' Shares at Partition.

During the lifetime of the father no distinction between his wives with sons and wives without sons is to be made in matters of partition. But after the father's death the jananī - the mother with child - is alone entitled, while stepmothers without child receive only maintenance, i.e. food and clothing, Mitra Miśra infers from the use of the term 'wives' in Vyāsa's and Yājñavalkya's text (2,115) that only at a partition during the lifetime of the father his sonless wives are entitled to shares equal to that of sons.

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[1] This, however, made the consent of the other non-alienating co-owners also necessary. See J.D.M. Derrett, 28 (1956) BSOAS, 488 & fn.11; 489 & fn3.

[2] 431: svatvāni svāmyāni naśyanti.../

At a partition between sons after the death of the father the use of the term 'mother' in Yājñavalkya's text points to the exclusion of sonless step-mothers.[1] Here Mitra Miśra follows the view of Jīmūtavāhana who also held that a sonless step-mother is only entitled to maintenance.[2]

Thus we get three views amongst the sastric medieval authors on the rights of wives and mothers etc. as regards shares at partition between sons: (a) the mother etc. is entitled to a regular share equal to that of a son. This is the view represented by Viśvarūpa, Vijñāneśvara, Aparāditya, Varadarāja, Mādhava, Madana, Śūlapāṇi and Bālambhaṭṭa. The term 'mother' in Vyāsa's text is used as standing for father's wives generally. Thus mothers, stepmothers, grandmothers and step-grandmothers are entitled to a share.

(b) Mothers etc. are entitled to maintenance only, that is they take only as much property as is necessary for their maintenance; they may take an equal share when the ancestral property is small, while they take only as much as would be necessary for their maintenance when the property is large. This is the view e.g. of the Smṛti-candrikā[3], and the Sarasvatī-vilāsa[4]. The tendency to exclude women from a

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[1] 453 f.; tr.II,333f. (ch.II,i,19.).

[2] Colebrooke's tr. III,29-30. See also Jagannātha, Vivāda-bhaṅgārṇava, vol.2, 244.

[3] See above, 296 .

[4] See above, 315 .

share is also supported by Haradatta[1], and is recommended in the Vyavahāra-sāra and Vivāda-candra[2].

(c) Mothers are entitled to a share, but not the wives of the father who are sonless. This is also the view of the Dāyabhāga. It became obliterated in the British administration of Mitākṣarā law, though it was retained in administration of Dāyabhāga law.

(5) Reunion.

Contrary to the strict attitude in the Mitākṣarā and Smṛti-candrikā in respect of the persons who might reunite, the Vīramitrodaya takes, it seems, a broader view of the possibility of reunion. The text of Bṛhaspati[3] does not exhaustively enumerate the persons who might reunite. The conditions for reunion are that jointness and partition have preceded the particular agreement to reunite.[4] For instance Mitra Miśra refers to the possibility of the reunion with the daughter's son which, he says, is universally established in practice.[5] Thus he also considers a reunion possible

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[1] See above, 229 .

[2] See Kane, HDh, III, 605, where the texts are cited.

[3] See above, 161 .

[4] 512: tasmād yeṣām paraspara-vibhāgas-teṣām eva tat-pūrvakaḥ paraspara-saṃsargo'py-abhisandhi-viśeṣa-pūrvako na paraspara-dravya-miśrikaraṇa-mātreṇa vaṇigādīnām ivety- ... Tr.II,401 (ch.III, i,13).

[5] Ibid.: yatas-tathā sati sakala-loka-vyavahāra-siddo dauhitrādi-saṃsargo'py-anyāyyaḥ syāt/

between mother and son. He supports this with the argument that though the mother did not participate directly in the partition she nevertheless may get a share at the choice of the father at a partition during his lifetime and since she receives a share at partition after the death of the father.[1]

The reason which may have induced Mitra Miśra not to interpret the text of Bṛhaspari strictly may be found in the fact that unlike Vijñāneśvara and Devaṇa he was not confronted to the same extent with agnates tending to separate as soon as possible and relations by marriage. In the South even among Brāhmaṇas there was in practice a close nexus of marriage and property ties between a person and his mother's brother's families and his father's sister's families. In the North on the whole the agnatic system of inheritance and exogamy was more widely practised. During the time of Mitra Miśra families stayed together longer so that reunion between separating cousins, etc. would be practical. As long as the property remained in the hands of joint agnates there was no harm to widen the circle of agnates who could reunite provided they had participated in a preceding partition. Mere mixing of property as in the case of traders

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[1]Ibid.: vastutas-tu sākṣān-mātrā vibhāgābhāve'pi jīvad-vibhāge pitricchayā tasya api bhāga-sadbhāvād-ajīvad-vibhāge tu sākṣād eva vibhāgokteḥ prītyā'bhisandhi-viśeṣa-pūrvakaṃ putraiḥ saha saṃsarga-sambhavāt/ ... atra bṛhaspati-vacanāt-paryyaṃ na mātrādi-nivṛttau/

would not do.[1] Mitra Miśra does not tell us how a partition between a man and his daughter's son can be contemplated. We may visualize a case where a person having no male issue separated his daughter's son in expectation of male issue. If this did not materialize the grandfather might resort to reunion with his daughter's son. The admission of the daughter's son does not necessarily imply the strengthening of claims of relations by marriage, because the son-in-law would either be a kind of ghar-jamāī having little or no connections with his relations by birth or would live in another village allowing one of his sons to substitute for male issue of his father-in-law.

The possibility of a mother's reuniting with her son is in accord with the tendency of Mitra Miśra to place all property deriving from agnates in the charge of agnates; in other words Mitra Miśra encourages the practice of mothers living under the protection of one of their sons.

VII. Nīlakaṇṭha's Vyavahāra-mayūkha.

(1) Daya and Reunion.

Mitra Miśra's contemporary defined dāya as property which is not reunited and is partible: asaṃsṛṣṭaṃ vibhajanīyaṃ dhanaṃ dāyaḥ/ Dāya is not wealth which is brought together

[1] Ibid. The necessity of a previous partition was discarded by the 'moderns' (navyāḥ) as recorded in the Vivāda-cintāmaṇi in connection with Bṛh.'s text. Dh.K.1556b, 1557a. See Jha's tr., 288f. We may assume that such 'reunions' were conceivable only in an agnatic pattern of kinship.

into a common fund for the sake of profit etc. Similarly dāya is not the wealth which is thrown together by reuniting members of the family. According to the opinion of some authors referred to by Nīlakaṇṭha, property is divided unequally at the time of a fresh partition after reunion, a view based on the fact of the possible inequality of shares thrown together at reunion.[1] This is like in the case of a partnership between merchants who may have contributed unequal shares and participate in the profit accordingly. Other authors referred to by Nīlakaṇṭha, would assign equal shares at a fresh partition notwithstanding unequal contribution at reunion.

The word pitṛ in the dictum of the Nighaṇṭu refers to any relative.[2] Nīlakaṇṭha follows here Vijñāneśvara and also takes up his classification of dāya in apratibandha and sapratibandha dāya.

Nīlakaṇṭha holds that only persons who were parties to the original partition could reunite. As illustration for persons with whom it was possible to reunite he mentions one's wife[3], paternal grandfather, brother's grandson, paternal uncle's son "and the like".[4]

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[1] See 147; tr.169.

[2] 93: Vibhaktavyaṃ pitṛ-dravyaṃ dāyam-āhur-maṃsiṇaḥ iti/ pitṛ-pādaṃ saṃbandho-mātropalakṣaṇam//

[3] She could receive a share from her husband when he divided the property between his sons. Āpastamba's doctrine that there could be no partition between husband and wife was evaded with reference to the text of Yājñ. which had declared 'wives should be made equal sharers' (Yājñ.2,115 and Yājñ.2,52)

[4] 146; tr.169.

If we take these illustrations as a reflection of the constitution of the family at the time of partition, we find that families are within contemplation which comprise three or four generations of male agnates.

(2) Son's Right to ask for Partition.

The son's right to ask for partition seems to be qualified by smṛti-provisions which allow a father to be deposed on grounds of vice or senility. In his comment on the text of Śaṅkha-Likhita - which enjoins that the eldest son should take over the management of the affairs of the family if the father is incapable to carry them out, or a younger son with consent of the brother - Nīlakaṇṭha holds that partition should take place with the consent of him who is able to maintain; but where all are able, no restriction to partition applies.[1] But this obviously refers to a situation where the father is disqualified for certain reasons and deals with the possibility of partition between brothers.

On the other hand Nīlakaṇṭha goes beyond the Mitākṣarā in holding that the father is not independent even in respect of ancestral moveables and thus may not alienate them, but may only regulate their use.[2]

As regards partition between brothers Nīlakaṇṭha introduces the concept of notional partition which is effected

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[1] 96; tr.89.

[2] 90f.; tr.80f.

by a mere declaration like: "I am separated from you!" Severance, he says, is merely a particular state of the mind and this declaration only manifests that state of mind.[1] The question what constitutes an unequivocal declaration of intention to separate and the presumption of the status of the other members when one separates, has been the topic of many cases in Anglo-Hindu law.

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[1] 86; tr. 86.

VIII CONCLUSIONS

We witness in the post-Mitākṣarā texts a persistent emphasis on the incidents of the patrilineal and patriarchal joint family. The institution of community of acquisition and common ownership between husband and wife recedes for practical purposes. Jointness of spouses in the property sphere is confined to the requirements for the joint performance of religious acts.[1] This is the effect of patrilineal jointness and the emphasis on the father-son relationship in the property sphere. Rights of women tended to be restricted and the shares at partition do not amount, according to some authors, to shares equal to that of sons, but to provisions of maintenance. The concept of common ownership between father and son in respect of all the father's property and the son's self-acquisitions, which are also part of the common estate and could be exempted at partition, was retained.[2] Perhaps we may say that there was no need

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[1] The Vīramitrodaya clearly says that the wife's right in respect to the husband's estate is technical (aupapattika) that is it fits the purposes of religious acts which have to be performed jointly by the spouses. The right is not real and mutual as in the case of brothers and at the death of the husband the technical ownership of the wife lapses. P.510; tr.399(ch.III,i,13), Kane, HDh,III, 603,fn.1140. We notice that Mitra Miśra does not cite as an example the mutual right of father and son; the son is paratantra and his rights tend to be subordinate rather than co-ordinate unlike in the case of brothers.

[2] Cp. the comment by Sāyaṇa on the Taittirīya-saṃhitā and Aitareya-āraṇyaka, above. Cp. also Vācaspati Miśra,

2 (Contd.)
Vyavahāra-cintāmani, para. 92, 9-10 (tr.53); para.144, 7 (tr.63). The status of the family members was decisive for the nature of the property; if it was stated in a plaint that the property was acquired by the defendant while he was joint with the plaintiff, the defendant can reply that the property was acquired after partition.

anymore to over-emphasize the concept of the son's apratibandha dāyādaship, because - under the influence of northern śāstric orthodox predecessors - authors were inclined to interpret the Mitākṣarā in the light of the patriarchal, patrilineal joint family. The main function of the son's being an apratibandha dāyāda in the Mitākṣarā seems to reflect the attempt to establish the patrilineal joint family as such. Later texts indicate that the patrilineal family was established and we notice a shift towards assigning more rights over property to the father. Most of the authors do not seem to be in favour of the son's absolute right to demand partition. If the father acted without consent and alienates ancestral immoveable property contrary to purposes recognized by law, which includes alienations for religious purposes without thereby prejudicing maintenance claims, the son may separate and safeguard his share in the sādharaṇam. That the son was normally prevented from separating against the father's will is also evidenced in customary law.[1]

We have taken the rules on reunion as a probable reflection of the existence of larger joint families.[2]

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[1] Rattigan, A Digest... (13th ed.),237. See also Foral de usos e costumes dos Gancares e Lavradores desta Ilha de Goa...(1526), in: Collection of material on Hindu Law in Port. India (SOAS), 155ff.,172:... and if somebody has four sons or more or less, they should not divide during his lifetime, except with his consent...

[2] Published family histories from Maharashtra (up to the 18th c.) show that families remained undivided for a period of two or three generations. See V.T.Gune, "The Social Development of Maharashtra", in: P.K. Gode Comm.Vol., Poona,1960,et 147.

Chapter IX

The Establishment of the British Administration of Hindu Law and the Concept of the Hindu Joint Family.

I. The "Gentoo Code".

In 1765 The East India Company acquired the diwānī of Bengal, Bihar, and Orissa. According to Warren Hastings' "Plan" of 1772 the administration of law relating to inheritance, which automatically involved cognate topics like joint family, adoption, maintenance and legitimacy, was to be based on the dharmaśāstra.[1] The passage of the plan relevant in our context which was made into binding law in s.27 of the Regulation II of 1772 may be recalled here: "In all suits regarding inheritance, marriage, caste, and other religious usages of institutions, the laws of the Koran with respect to Mohamedans and those of the Shaster with respect to the Gentoos shall be invariably adhered to". The ascertainment of the dharmaśāstra relating to the topics listed in the section was to be secured with help of śāstris or pandits including court pandits. The function and mode of application of the dharmaśāstra in the traditional system differed, however, from the convictions of English judges on the topic.

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[1] Plan for the Administration of Justice Extracted from the Proceedings of the Committee of Circuit (Cossimbazar) 15 Aug.1772, being pp.13-25 of Extract of a Letter from the Governor and Council at Fort William to the Court of Directors, 3 Nov. 1772. See J.D.M. Derrett, "The Administration of Hindu Law by the British", Comp.Studies in Society and History, 4(1961) 11-52, at 24ff.

The traditional dharmaśāstra system purported to be in practice the juridical framework for Brāhmaṇas and castes under the influence of the dharmaśāstra, subject to local customs and ad hoc decisions which would consider social factors beyond the bare facts of a case and aimed at mutual unanimity between litigants and affected communities. The result was that issues might be decided differently from case to case. The dharmaśāstra itself as interpreted by medieval authors fluctuated, as we have seen, greatly; the practical influence of a particular author was established if by his interpretation he could accommodate the needs of various communities within his contemplation. The consequence of this approach was the apparent vagueness of śāstric law. An attempt to continue the traditional method of settling disputes within the framework of the dharmaśāstra was to a certain extent a success in French India. Here decisions were arrived at by native authorities after consultation of caste leaders and, if desirable, of śāstric texts.[1] The British administration was faced with problems which eventually led to the adoption of characteristic English methods of the application of the law.[2] The tendency of the śāstris to interpret śāstric rules to fit a decision ad hoc rather than to rely on 'abstract'

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[1] Derrett, ubi cit., 20f., Leon Sorg, Avis du Comité Consultatif de Jurisprudence Indienne, Pondicherry, 1827.

[2] See in this connection Derrett, op.cit., 22.

law and precedent was so far in consonance with the traditional outlook. But probably the absence of the functioning of the traditional social system in front of the modern courts, i.e. the non-applicability of the traditional desire to arrive at a compromise between the disputing parties or between interdependent communities rather than the insistence on "abstract" law, made the interpretations of the śāstra by the pandits susceptible to influences which would strike British administrators as corruption. The need for certainty of the law was thus felt and the first attempt to arrive at a consolidation of the floating mass of śāstric law was the compilation of the "Gentoo Code" by a committee of eleven pandits.[1] In the context of our subject the work restates typical Dāyabhāga rules and adds the views of pandits from Mithila where these differ. We may mention here some of the important provisions.

(a) The Mithila rule that a widow inherits if her husband dies separated and without son, grandson and great-grandson, and the view of Jīmūtavāhana and his followers that the property goes to the widow (or widows) whether he died separated or unseparated from his collaterals are stated side by side.[2]

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[1] Vivādārṇava-setu ("bridge across the ocean of litigation") or Vivādārṇava-bhañjana ("breakwater to the ocean of litigation") Tr. N.B. Halhed, A Code of Gentoo Laws or, Ordination of the Pundits, London, 1777. Tr.into German by R.E. Raspe, Gesetzbuch der Gentoo's, oder Sammlung der Gesetze der Pundits, nach einer persianischen Übersetzung des in der Schanscrit-Sprache geschriebenen Originales. Aus dem Engl., Hamburg, 1778. Derrett, "Sanskrit Legal Treaties Compiled at the Instance of the British", ZVR, 63(1961), 72-117, at 85ff.

[2] Ch.II, i,25f.

(b) The work elaborates on the provisions of acquisitions by sons during the lifetime of the father given by Jīmūtavāhana.[1] A son who has employed property of the father and grandfather and acquires fresh property, has to give half of his gains to his father. If he has no brothers, he shall take the other half himself. If he has brothers he shall take a double share of the remaining half and shall give each brother a share of his acquisition.

If he has not been advanced with any property and he makes gains, he shall give half to his father, whereas his collaterals would not receive a share. A person employing his brother's property and acquiring any profit should give half to his father whereas his collaterals would not receive a share.

A person employing his brother's property and acquiring any profit should give half of it to his father, if the father is learned, he himself should take a double share, the person whose property was employed should receive a single share, and those whose property was not employed shall not receive anything. If the father is not a man of learning, he shall receive a double share, and he who made the profit should also receive a share; the person whose property was employed shall receive a single share.[2]

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[1] See above, 241f..

[2] Ch.II, ix, 67f.

(c) A father is said to have no power to sell, or give away, ancestral property without the consent of the sons. This is modified in the next paragraph by the statement that a father should not give or sell the property whether self-acquired or ancestral to the prejudice of the maintenance claims of his dependents.[1]

(d) Partition between sons is not 'right and decent' during the lifetime of the mother unless she gives them instructions accordingly. She may receive at her wish a share equal to that of a son, subject to her having received strīdhana from her husband in which case she would get only half of the share of a son; similarly in the case of grandmothers. The sonless widow of the father does not receive a share but only food and clothing. The view of the pandits of Mithila is stated which shows that the strict Mitākṣarā view had prevailed there rather than the views of Mitra Miśra: a father's sonless widow is to receive a share equal to that of a son.[2]

(e) A brother joint with collaterals shall not alienate joint property without the consent of his brothers. An alienation of part of the property may be validated at the computation of his share at partition. But if he alienates to a man "of fraudulent principles, so that loss and vexation should accrue thereby to the partners, the man who thus gives away,

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[1]Ch.II, xi, 72.

[2]Ch.II, xii, 75-8.

sells, or mortgages such property, is to be accounted criminal". The Mithila view is that an alienation without the consent of part of joint property, becomes valid at the computation of one's share at partition.[1]

The first attempt to sift the mass of śāstric rules and compile a "code" was from the practical point of view (generally speaking) a failure, mainly because it omitted to treat of many aspects of practical importance.[2]

II. The Vivāda-bhaṅgārṇava or 'Colebrooke's Digest'.

(1) Partition by Father.

Another work which was subsequently composed to assist European judges was the Vivāda-bhaṅgārṇava by Jagannātha.[3] In respect of the subject under discussion it represented an elaboration of the rules of the Dāyabhāga school and many rules of the 'Gentoo Code' were discussed while referring to all possible points of the then available śāstric learning. Often no definite and settled conclusions are given, of which in fact the judges were in demand. At times Jagannātha shows signs that the śāstra was adaptable to new requirements under the influence of the administration of law. Thus e.g. if the father divided his property amongst his sons, he may resort

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[1] Ch.II, xiv, 80f.

[2] See Derrett, op.cit., 86-8.

[3] References are to the Madras ed. of Colebrooke's tr., 2 vols. 1864-5.

to unequal distribution when filial piety, the maintenance of a larger family, inability to earn a livelihood etc. fall to be taken into account. Here the father's discretion is completely unqualified. But can he exclude the son completely from a share? He can do so only after proving that the son is inimical towards him 'in the presence of the king, or before a public assembly'.[1] It is possible that this contemplates a testament similar to the testamentum calatis comitiis. The history of the testament may well have been explained to Jagannātha. This allusion is inserted rather abruptly between the statement that the father may divide his self-acquired property at his discretion and the statement that the father commits only a "moral offence" and does not incur a "civil penalty" if in fact he does not give a share to any of the sons though the son is not guilty of an offence, and gives a share to one guilty of an offence. Thus the exclusion of an inimical son mentioned above which cannot be validated by simple assertion on the part of the father, can only refer to effects intended to take place after his death. This conclusion also derives support by the latter statement that in respect of immoveable property an unequal distribution is only 'morally considered' unlawful.[2]

The immoveable ancestral property inherited from the grandfather may be alienated by gift which is not a moral

[1] II, 237f.

[2] II, 260.

offence, though this is the case with an alienation of the whole immoveable ancestral property.[1] It is significant that Jagannātha declares at one place that sons oppressed by the stepmother 'or the like' may appeal to the king and obtain partition from their father in respect of ancestral property.[2] Here we may detect that guardianship proceedings as known to Anglo-Hindu law had entered the śāstra.

(2) Validity of Gifts in Contravention of Rules in the Smṛtis.

The distress of the family caused by gift or alienation of the whole immoveable property is only the cause of moral guilt. The gift or alienation is not annulled, as the gift is done by an 'owner'; the alienation is only void, if the owner is either insane or similarly incapacitated.[3] The absence of consent by the sons at an alienation of ancestral immoveable property entails merely a moral offence.[4]

Thus according to Jagannātha a gift is valid provided the object gifted was the property of the owner, and 'even 100 texts cannot bar the validity of the gift'.[5] In fact only that gift is invalid which is considered as 'ungiven' in the Smṛtis[6] like gifts given under influence of fear, anger, or grief, while suffering from disease etc. Gifts which are

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[1] II, 361.
[2] II, 266.
[3] II, 259, 261.
[4] II, 240.
[5] I, 411.
[6] 'Adatta'; see Narada 5, 2 and 11 = Dh.K., 798,a and 800,a.

termed as adeya (ungiveable) in the Smṛtis do not prevent the validity of the gift.[1]

Jagannātha tells us that in the Mithila school[2] the gift of the whole estate without the assent of the sons is invalid. He refers this to the case of gifts for civil causes. Gifts for religious purposes are valid in any case.[3]

The text of Yājñavalkya 'maṇimuktāpravālānām' and similar texts indicate according to Jagannātha once more only a moral rule and do not invalidate alienations.

(3) Maintenance.

The text of Dakṣa which prohibited gifts of one's own whole assets, when male issue was living, apparently intended to safeguard the maintenance of the sons, but as we have seen, in the opinion of the author, the gift of the whole property is valid in case of religious donations. Elsewhere he tells us that gifts for civil causes are not valid if the subsistence of the family is thereby affected. Only the remainder, after sufficient property has been set apart for the maintenance, may be gifted.[4]

We have to remember that Jagannātha, in working out the absolute ownership of the father over all property, proceeds on the assumption that, as long as the ownership of the

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[1] See texts cited in the Dh.K., 793ff. On Jagannātha's rule see J.D.M. Derrett BSOAS, 20(1957) 214; Priyanath Sen, General Principles of Hindu Jurisprudence, T.L.L., pp.83, 85-86.

[2] See Mitra Miśra, infra, p.

[3] II, 410, 422 f.

[4] I, 410.

father over all property, proceeds on the assumption that, as long as the ownership of the father exists, the son's claims are based on maintenance, i.e. the personal obligation of the father towards the son and other members of the family. There was no need in Jagannātha's time to secure the son's maintenance by giving him rights from the point of view of ownership. The alienor has full ownership and therefore an alienation may be void because of the non-observance of the prohibition to maintain the family. Therefore one may alienate the remainder of the property after setting aside sufficient property with a view of the probable life-span of the family members to be maintained.[1] Sufficient moveable property may be set aside for necessary consumption and may be alienated as soon as other moveable property has been acquired.[2] Jagannātha notices an opinion which he calls in consonance with settled usage: a man may give away the immoveable property after setting aside a sufficient amount necessary for maintaining the members of the family and their families 'for a long time'. The amount of property is to be determined by 'five prudent persons', i.e. probably by a caste council or seniors of the family group. Likewise the amount of moveable property is to be determined before the remainder may be given away.[3] Jagannātha declares, as we have seen, that only

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[1] I, 410.
[2] I, 411.
[3] I, 411.

civil gifts in neglect of maintenance are void, but it seems that he mitigates his proposition when he cites the opinion of authors without refuting them who hold that civil and religious gifts in neglect of maintenance duties are void. Jagannatha merely adds his observation that people who are able to acquire wealth speedily, do perform e.g. the viśvajit sacrifice in which the sacrificer is to spend his whole wealth.[1] Jagannatha's whole discussion suggests that a gift for religious purposes (dharmārtham) in neglect of the requirements of the family could certainly not be styled 'religious'.

(4) Alienation of the Undivided Share.

The text of Vyāsa[2] which prohibits a co-heir from alienating joint immoveable property, but also the text of Bṛhaspati[3] which prohibits the alienation of common property and the text of Nārada[4] form the basis of the proposition that a coparcener may alienate his share in the undivided property.

As it is not yet ascertained until partition what particular item a co-heir will obtain, even if he enjoys the possession of a particular item (see below, p.) the consideration of an item being sold becomes common property of the co-heirs.[5]

The lack of consent of the co-heirs entails a moral offence merely. However, punishment is involved as one cannot

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[1] I,440; See Manu 11, 74; tr. G.Jha, vol.5, p.398 f.
[2] I,303.
[3] I,401 f.
[4] I,401.
[5] I,30 .

ascertain before partition whose property has been sold and whether the alienor was the owner or not.[1]

The consent is necessary to alienate the whole of the joint property, otherwise the sale is invalid up to the extent of the seller's share.

The lack of consent is thus not an essential requisite for conferring validly one's own right and thus a co-heir's gift of his own share is valid.[2]

Jagannātha tells us that it is not a custom 'in some countries' to make gifts or sales of undivided land or other property, because the alienor cannot see what is really his. Though Jagannātha cautiously admits the possibility to alienate one's share, he points out that in practice this has arisen only due to the possibility that the king does not intervene in trifling occasions to fine the alienor or can be ascribed to the indifference of co-heirs who have omitted to apply to the king for intervention. He suggests that if a co-heir wishes to sell his share before partition for the maintenance of his family which he can not otherwise provide for and the other co-heirs do not assent to the alienation or refuse to partition the property, the co-heir may apply to the king for intervention. This points already to the influence of Anglo-Indian administration of law where partition could be effected by a decree. We can see, however, how much the theoretical possibility to make use of one's share for individual purposes was still limited in practice.

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[1] I, 303.

[2] I, 403.

Details of the Alienation of Specific Property or of an Unascertained Share before Partition.[1]

The co-heirs may choose to share the value of the effects at a partition or they may recover their shares of the effects, because the co-heir cannot annul the ownership of the others and the alienee, 'being in the shoes of the alienor', may have to wait for partition at which the item may be included in his share.

The question is discussed whether sale of a particular item determines the property of a coparcener therein, the same way as distribution by lot determines property. Otherwise it may appear that by the consumption of the produce of the sale embezzlement of the property of another co-heir may happen. Jagannatha decides that by the sale no interest dissimilar to that of the other coparceners is created, but a right proportionate to the share of the alienor.

Similarly, occupancy of property, as we have already indicated above, which comes to be alienated by one of the co-heirs does not manifest property. It is only at partition by lot or otherwise that property is ascertained.

Property may be alienated without penance or punishment for necessary consumption. Undue consumption of the produce of a sale involves punishment.

Alienation of a specific item, requires specific authorization by the co-heirs, which supposes a common right vested

[1] I, 404 f.

in all the co-heirs in each particular item. Due to this notion, a co-heir may give or sell his own share without specification of a particular item. The alienee may then be admitted to the distribution by lot at a partition.

An alienee thus has no opportunity to realise the share sold or donated to him by one of the co-heirs without the consent of the rest and has to await partition where the share may be allotted to him. In respect to specific items, probably when they have not been actually handed over to the alienee, partition has to be similarly awaited at which the items may be allotted to the alienee if the co-heirs assent to the inclusion in the share of the alienor.

Jagannātha comes to the conclusion that a co-heir may cancel his right in the estate and can validly alienate his share, but has to perform penance if there is no consent by the rest of the co-heirs. The alienee's rights, we may add, are not protected and until partition his share may be subjected to diminutions, though the size of the fraction was predicable unlike in the law of the Mitākṣarā school. Jagannātha cleared the way for the eventual recognition of an alienee's right to partition which was recognized in Anglo-Hindu law.

(5) The Fate of Jagannātha's Work.

Jagannātha's digest had not removed the difficulties for the judges had no means of personal access to śāstric literature and modes of interpretation. Sir F.W. Macnaghten in his Considerations on the Hindoo Law as Current in Bengal which had mainly as purpose to render the law certain[1] commented on the Vivāda-bhaṅgārṇava: "Of Jagannātha's digest, it is enough, in this place, to say that the labourer might have given a more appropriate appellation to his work".[2] Yet he refers to Jagannātha in his work and H.H. Wilson in his Review on Considerations of the Hindu Law[3] calls it "an exceedingly useful work although it does not profess to save those who consult it the trouble of judging for themselves". In fact Sir Thomas Strange in his Hindu Law makes constant use of the Vivāda-bhaṅgārṇava and it certainly contributed, together with other works emanating from Bengal, to the diffusion of aspects such as the spiritual benefit theory, the patrilineal, patriarchal joint family, the introduction of wills, and the power of a dāyāda to alienate his undivided share.

III. Selection and Abrogation of Rules of the Śāstra. The Attitude towards Customary Law.

Details of family custom were fluctuating, thus e.g. whether self-acquired property could be alienated by the father

[1] Preface, xi f.

[2] Preface, xvi.

[3] Works of the late Horace Hayman Wilson, vol.5, 1865, at 43.

without consent of the sons, whether the eldest son would receive a preferential share, or whether partition should be per stirpes or by mothers. In Punjab customary law e.g. we have a situation which might differ from family to family.[1] In Bhagvandas v. Rajmal[2], Westropp, C.J., expresses the general policy towards customary law in the administration of Anglo-Hindu law: "In this country it is no uncommon experience to find the custom alleged to be that which for the moment it is convenient to those who assert its existence that it should then be. I have known the most conflicting customs to be from time to time asserted to exist in one and the same sect. We find it necessary to scrutinise evidence of usage closely, and especially to demand specified instances of the custom".

The superior influence of works like the Dāyabhāga and Mitākṣarā not only amongst pandits but also amongst judges, because they were accessible in translation, enabled certain śāstric rules to be abrogated while others were selected, emphasized and perpetuated. Thus e.g. the patnī-bhāga rule was held to be a kulācāra and to prove the family custom clear and positive proof that the usage was ancient and had been invariable became necessary;[3] or it was held to be applicable to Śūdras.[4] In fact the rule would be inconvenient in a strict patrilineal exogamous set-up of the family system

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[1] Rattigan, A Digest of Customary Law...(13th ed.), see chundavand, pagvund, self-acquired property, share of the eldest son.

[2] 10 Bom.H.C.R. 261.

[3] W.H. Macnaghten, Principles and Precedents of Hindu Law, vol. I, 16 fn.1.

[4] Strange, op.cit., I, 205f., where he says that the law of the Śāstras is superseded by the patnī-bhāga rule. See cases cited at II, 351-7.

where no connections to relations by marriage existed in the property sphere. Where however families were particular of having alliances through marriage connections, the mothers' families by birth might contribute to the support of the descendants of their married daughters. Here a partition by mothers of the property descending in the male line would be just. But if connections with families by marriage were formal and the descendants of each mother were more or less exclusively dependent on the property deriving from the father and his paternal ancestors, a partition by mothers may be greatly unjust. A partition per stirpes by giving each son an equal share would be the solution. We noticed in the preceding chapter a gradual move away from the influence of the mother's relations by birth, accompanied by a tendency to rely exclusively on the ancestral property deriving from paternal ancestors.[1] Here if the wives were of equal caste an assignment of a share equal to that of a son to each wife or mother and a partition per stirpes was appropriate.[2] It seems that the administration of Hindu law by the British started at a period when the śāstra had begun to neglect mātṛ-bhāga and in fact accelerated the process of eliminating

[1] See the Sar.vil. which says that the partition by mothers occurs among Vaiśyas (cp. the custom of the Chetties referred to above, 162 fn.2) and Śūdras, para. 79.

[2] Or shares were assigned to sons according to the status of the mothers. See above, .

a custom which was nevertheless still widely prevalent in the South[1], though declared as not recognized there.[2]

IV. The Rights of the Father in Bengal.

(1) Partition and Alienation of Ancestral Property.

The Factum Valet Doctrine.

The British administration was faced with the problem of assessing the powers of the father at Dāyabhāga law. The rules of partition of property by a father served in the traditional atmosphere as a guide to the father as well as to his relatives and the social group to which he belonged. The father as the sole owner of all property had the responsibility of seeing that the property was divided according to these accepted conventions. Unequal partition, or even e.g. the assigning of the whole property to one son may be fully justified, though morally the property belonged to his descendants as well. In respect of ancestral immoveable property his sense of responsibility was especially called for. There were various means and ways to prevent or to rectify the actions of a father and to cause him to abide by his social and religious obligations.

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[1] See Strange, op.cit., I,205. See note by Colebrooke at Strange, II, 351, and Ellis' note at 357.

[2] Mutuvegŋgudachellasawmy Manigar v. Tumbagasawmy Maniagar, (1849) Mad. S.U. 27 Cp.Mayne's Treatise on Hindu Law and Usage, 506 fn.e.

Whatever the father did with respect of partition or alienation of his property, he could not defeat the maintenance claims of his dependents and these claims attached to his property. When the question of alienation of ancestral property was raised before the courts there was an alternative to interpret the father's powers as absolute or to invent devices which would transmute some of the traditional and moral checks into binding law. Very early in 1792 it was held after consultation of the court pandits that a gift of the whole immoveable property to an eldest son subject to pecuniary provisions for the youngest son was valid. The decision was based chiefly on the doctrine that the gift was sinful, but valid.[1] In the case of Bhowannychurn Bunhoojea v. The heirs of Ramkaunt Bunhoojea a father had allotted in a deed of partition unequal portions of his property including immoveable ancestral property and - his deposition not having been carried into effect during his lifetime - was held as not binding after his death.[2]

Sir F.W. Macnaghten discussing the issue at length identified the Bengal theory that acts may be sinful but valid with the doctrine quod fieri non debuit, factum valet and

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[1] Eshanchund Rai v. Shorchund Rai, 1 S.D.A. Rep.2. See also Ramkoomar Neaee Bachesputtee v. Kishenkunker Turk Bhoosun, 2 S.D.A. Rep.42. Sir F.W. Macnaghten, op.cit., 271-4.

[2] 2 S.D.A. Rep.202: 6 I.D.(O.S.) 556; W.H. Macnaghten, op.cit., I,10.4.

applied it to the case of unequal gifts or partition of ancestral immoveable property by the father.[1] W.H. Macnaghten in his Principles and Precedents of Hindu Law arrived at an opposite opinion. He relied on Bhowannychurn Bunhoojea's case[2] apprehending that if the doctrine of factum valet as deduced from Vyāsa's text in the Dāyabhāga would be applied in all contexts, it would have "the effect of superseding all law". He pointed out that the text of Vyāsa was cited "in the chapter of the Dāyabhāga which treats of self-acquisitions, and has no reference to ancestral property".[3] He then relies on Mitākṣarā provisions which seems inappropriate.[4] We see that opinions on the issue conflicted. In 1830 Ram Mohan Roy published a defence of the view that a father should have the power to alienate at his free will.[5] Ram Mohun Roy calls the son's right of interdiction or partition against the will of the father as abhorred by common sense; the birth of a son

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[1] Op.cit., 33,247,301. See J.D.M. Derrett, "Factum Valet: The Adventures of a Maxim", Int.Comp.Law Qly. 7(1958) 280ff., at 294ff. See also Sir Thomas Strange, Hindu Law, I,87. Sir F.W. Mannaghten's view was criticized by H.H.Wilson, op.cit., 65ff.76, who wanted the court to have the power to determine whether an unequal distribution had been with 'caprice or injustice'. Ibid.,74.

[2] 2 S.D.A.Rep.200: 6 I.D.(O.S.) 556.

[3] P.46.

[4] Ibid.

[5] Rajah Rammohun Roy, Essay on the Right of the Hindoos over Ancestral Property, according to the Law of Bengal, Calcutta, 1830. Roy also criticises H.H.Wilson's 'Review'; see at 37ff.

would be considered a curse rather than a blessing.[1] This probably reflects correctly the psychological background to Jīmūtavāhana's approach which led him to negative any legal rights of the son apart from maintenance before the ceasing of the father's rights.[2] Ram Mohun Roy further believed that recognition of the unhampered powers of the father was a progressive step and in the interest of commerce which the introduction of the Mitākṣarā rule would stifle. He mentions that to procure loans on the credit of one's property whether ancestral or self-acquired has long been in use.[3] However the regard for ancestral immoveable property was even high in Bengal and the absolute power in respect of such property was not unanimously accepted by the public.[4] The general trend of the decisions was already in support of the absolute power of the father in respect of alienation and thus in support of an unequal partition of ancestral immoveable property.[5] In Kumla Kaunt Chuckerbutty v. Gooroo Govind Chowdree[6] it was held that by the law as current in Bengal, a son has no right in the ancestral property

[1] Ubi cit., 72.

[2] See above, 231ff, 234ff.

[3] 16.

[4] See the long discussion between Ram Mohun Roy and an "Anonymous Hindoo" printed in the appendix to the essay referred to. Also G.C. Sarkar Shastri, A Treatise on Hindu Law, 3rd ed., Cal., 1907, 274-6.

[5] See Colebrooke's note on Eshanchund Rai v. Eshorchund Rai, (1792) 1 S.D.A. Rep.2. Morley's Digest, I,38(1).

[6] (1829) 4 S.D.A.322.

inherited by his father during the father's life and in Juggomohan Roy v. Neemoo Dossee[1] it was held that a Hindu who has sons alive, can without their consent, sell, give, or pledge, immoveable property and can without their consent, by will, devise, prevent, alter or affect their succession to such property.

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[1](1831) Morton's Decisions (Sup.Court Calcutta) 90.

(2) The Introduction of Wills

There are references in the śāstra which show that a person could direct his sons or other near heirs to fulfil religious gifts, promised by him, after his death.[1] It was especially said to be of imperishable religious merit to make donations of cows, land, sesamum, and gold at the time of death.[2] Secular gifts or 'bequests' were probably binding on the estate in practice which we may conclude from the very fact that a Smṛti-passage negatives such a custom.[3] In any case such an elaborate arrangement which is recorded in a document surviving from the Marāṭha period

(ctd. on next page)

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[1] Kṛty.566. See Mayne, Hindu Law and Usage, 873f. Śabara in his Bhāṣya on the Mīmāṃsāsūtra(X,2,58) says that if a sacrifice is instituted by a yajamāna(sacrificer) and if he dies during the performance, he nevertheless receives the apūrvam(spiritual merit) of the sacrifice when the same is completed according to his instructions. See Derrett, Introduction to Modern Hindu Law, para.700.

[2] Varāha-purāṇa, cit. by Raghunandana, Śuddhi-tattva, 271: puṇya-kālas-tadā sarvve yadā mṛtyur-upasthitaḥ// go-bhū-tila-hiraṇyādi dattam akṣayam iyāt //

[3] Bṛhaspati-14,14 139 , cit. in Vyavahāra-nirṇaya,298-9: mad-ūrdhvam iti yad-dattam na tat-svatva-vahaṃ bhavet/ tehedānīm adattvān mṛte rikthinam āpatet// - " A gift promised with the words 'after my death' shall not produce property, as what is not given by the promisor fall to the heir on his death". See Derrett, ubi cit.

and which was to take effect post mortem, must have been expected to be followed in practice.[1] From donations inter vivos and death bed partitions of property or what Ram Mohun Roy had called "predetermination of allotments"[2] which the śāstra allowed and which had to be carried out even after the death of the donor or allotter of property, it was a small step to identify and recognize juridically testamentary power. As a matter of a fact testamentary power was undisputed in the courts with the exception of the case of Bhowannychurn Bunhoojea v. The heirs of Ramkaunt Bunhoojea[3] which was considered to have been superseded by Joggomohun Roy v. Neemo Dossee.[4] The decision in the case of Ramtoonoo Mullick v. Ramgopaul Mullick[5] that a Hindu "might and could dispose by will of all his property moveable and immoveable, and as well ancestral as otherwise", was confirmed on appeal by the Judicial Committee of the Privy Council in 1829.[6] From Bengal the juridicial recognition of testamentary power spread to Madras and Bombay eventually.[7]

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[1] See Kane, HDh, III, 816.

[2] Op.cit., 62f., referring to Śrīkṛṣṇa on Dāyabhāga I,38. On the development of testamentary disposition see also Tagore v. Tagore, (1872) I.A. Supl.Vol., 47 and Gadadhur Mullick v. Off.Trustee of Bengal, (1940) 67 I.A.129.

[3] See above, 355 .

[4] (1831) Morton's Decisions (Sup.Ct.Cal.) 90.

[5] Sir F. Macnaghten, op.cit., 336, 356, 357.

[6] 1 Knapp, 245.

[7] See Mayne, op.cit., 874. paras. 740-1.

V. The Concept of the Undivided or Joint Family.

(1) The Undivided Family in Early Textbooks (Strange's Hindu Law).

The influence of the patriarchal joint family as especially reflected in Dāyabhāga law is also discernible in the notions which guided textbook writers like Sir Thomas Strange and W.H.Macnaghten in their description of Mitākṣarā law. At that early stage the subject was viewed rather as an aspect of inheritance - the son inheriting from the father - and of partition - taking place after the death of the eldest common ancestor between collaterals. In one place Sir Thomas Strange calls partition which takes place during the lifetime of the father "an amticipated descent of property".[1] In his chapter on inheritance Strange says that the "Hindus are a patriarchal people, many families living together as one; connected in blood, and united in interest..."[2] Introducing his chapter on Partition he says that "as partition, in the life of the parent, is, in modern times, of but rare occurrence, it has been thought by some, that any account of the law of it here might be reasonably dispensed with..."[3] When property had

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[1] Hindu Law, I, 191.

[2] Op.cit., I, 12o.

[3] Op.cit., I, 176.

descended to sons, they were called coparceners; if the father was joint with his brothers and their wives etc. leaving widows,daughters and other dependents it was called an undivided family.[1] In other words following Dāyabhāga law a coparcenary could only be contemplated between collaterals after a common ancestor had died and the property had 'descended' to the male issue.[2] The son as apratibandha dāyāda was contemplated rather as having an inchoate right or coordinate concern in respect of the ancestral property which is called family property.[3] The main difference Bengal and the other provinces was seen merely in the son having no right in ancestral immoveables according to Bengal law whereas in non-Bengal law such right was recognised. Father and son were not contemplated so much as joint in status in spite of the son's having an interest in the ancestral property of the grandfather. The son would have a right to realize his claim during the father's life only in particular exceptional circumstances, equivalent to the traditional orthodox-śāstric causes on which the father's rights cease. However if the father chose to divide the ancestral property, he had to make equal shares and if he wanted to alienate it, he had to seek the consent of his sons.[4] Thus the apratibandha dāyāda is compared with an heir apparent at English law.[5]

[1] I,198f.
[2] See Strange, I,120.
[3] Strange, I,177, 17f.
[4] Strange, I, 17f.
[5] Strange, I, 131.

It is in accord with this notion of the son only being an heir apparent that Sir Thomas Strange does not recognize the absolute right of the son to ask for partition. He says: "In the provinces dependant on the government of Madras, and elsewhere in the peninsula, the right of the son to exact partition of the ancestral property, independent of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure...[1] Contemporary śāstric learning was similarly against an absolute right of the son to ask for partition.[2]

(3) Constitution of the Joint Mitākṣarā Family at Anglo-Hindu Law. The Concept of Survivorship and Coparcenary. Maintenance.

The concept of the Hindu joint family at Anglo-Hindu law originated in this atmosphere of patriarchal and patrilineal jointness. The large patriarchal household where several generations might reside jointly in subordination to the eldest common ancestor was taken as a normal feature of Indian life. We have seen in the previous chapter that the post-Mitaksara sastra itself probably reflects a movement towards patrilineal jointness and the decrease of the powers of the male issue, though this applied probably only the large and influential landholding families. The Privy Council recorded this trend as far as jointness is concerned by declaring

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[1] I, 184.

[2] Dāya-daśa-ślokī, ed. and tr. (without -vyakhyā) by A.C. Burnell, Mangalore, 1875. See śl.1.

that the joint and undivided family is the normal condition of Hindu society and that an undivided Hindu family is ordinarily joint not only in estate but in food and worship.[1] Probably from that time derives the habit to speak of the joint Hindu family for which probably the closest equivalent in Sanskrit is the term kuṭumba.[2]

Gradually the rights of the members of the family as individuals and as a whole were ascertained, articulated and mobilized - reflecting a movement away from the preoccupation of the śāstra with the rights of the father. In Katama Natchiar's case[3] the Privy Council while dealing with the rights of a widow in respect of self-acquisitions of her husband introduced the principle of 'survivorship' for describing the process of not leaving the interest in ancestral property by succession. The undivided owner (svāmi) was styled coparcener. We may recall the often-quoted dicta: "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 the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common

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[1] Raghunadha v. Brozo Kishore, (1876) 3 I.A.154,191. Neelkisto Deb v. Beechunder, (1869) 12 Moo.I.A.523.

[2] See above, 31ff.

[3] (1863) 9 Moo.I.A.539, 614.

possession.[1] Here we notice that the notion of the sons 'inheriting' the ancestral property was abandoned by implication. The sons' rights became rather coordinate with those of the father than subordinate. Goldstücker, in his essay entitled "On the Deficiencies in the Present Administration of Hindu Law"[2] deplored the introduction of the notion of 'survivorship'. The Privy Council had held that "there are two principles on which the rule of succession according to the Hindu law appears to depend; the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship".[3] Goldstücker argued that there is only the principle of spiritual benefit determining the right. According to the Dāyabhāga school, he said, "the widow would confer the greatest spiritual benefits on the soul of a deceased husband, provided he leaves no male issue", so that "she is always entitled to succeed to the property of the husband, whether the latter be divided or not. The Mitakshara school, on the contrary, not admitting this superior spiritual power of a widow in an undivided family, excludes her from the position she holds in the Dāyabhāga school". In answer to Goldstücker's criticism we

[1] At p.615.

[2] Journal of the East India Association, No.1, vol.5, 1ff.at 15ff.

[3] Katama Natchiar, (1863) 9 Moo.I.A. 539, 614.

may suggest that the Mitākṣarā contemplated mere jointness of collaterals as excluding the widow's right in her husband's estate the spiritual benefit did not play a role at all. The spiritual benefit was used in support of a certain proposition rather than determining the right a priori. Post-Mitākṣarā authors used e.g. the concept of the right to perform śrāddha for establishing firmly the rights of the great-grandson to the property of the great-grandfather.[1] The introduction of English legal terms was deplored at times, but in practice their meaning was either distinguished or modified and adjusted to Indian needs in usage and judicial decisions.[2] "Survivorship" was borrowed from English legal usage where it is associated with joint ownership in a joint tenancy. It became eventually well established that the incidents associated with joint ownership under Mitaksara law were not identical with those known to the English law of joint-tenancy. In re The Hindu Women's Rights to Property Act[3]

[1] See e.g. Vīramitrodaya, Setlur's tr., II, 341f.

[2] For coparcenary not being identical with coparcenary in English law see Lord Dunedin's remarks in Bajnath Prasad v. Tej Bali Prasad, (1941) 48 I.A., 195,211. See also e.g. Karsondas v. Gangabai on the difference between joint property, joint family property, and joint ancestral family property. (1908) I.L.R. 32 Bom.479. For the difference between Mitākṣarā coparcenary and English coparcenary, and Mitākṣarā coparcenary and English joint tenancy, see N.R. Raghavachariar, Hindu Law, 4th ed., 243f.

[3] 1941 Fed.Ct.Rep. 15 at 32.

it was stated: "There is however this degree of resemblance between the jus accrescendi and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors - whose pre-existing interest extended over the whole property, - are increased only because of the diminution in the number of sharers". In other words the term 'survivorship' was used differently in Anglo-Hindu law and became adopted in default of a better expression.

The membership of the coparcenary was based on texts like Devala's 'avibhaktā vibhaktānām...'[1] These texts were handed down by 'orthodox-śāstric' authors and authors of the Dāyabhāga school, e.g. Jagannātha in his Vivāda-bhaṅgārṇava. In Moro Vishvanath's case the right of the male issue to offer piṇḍas - which was taken in 'orthodox-śāstric' texts as entitling a great-grandson to inherit from his great-grandfather or to take a share at partition - was taken as co-extensive with the right by birth and as entitling to a

[1] See above, 28f. Moro Vishvanath v. Ganesh Vithal, (1873) 10 Bom.H.C.R.444. For Baudhāyana's text 1,5,11,9-14 (56; Dh.K.1467bf.) see Mayne Hindu Law and Usage, 577. Since the Vīramitrodaya (Setlur's tr.II,391-2) sapiṇḍa in the text of Baudhāyana was understood to mean 'partaker of an undivided oblation'. This follows the Dāyabhāga.

right to demand partition.[1] In Dasharatharao v. Ramchandrarao,[2] Gajendragadkar,J., as he then was, stated the rule thus: "...Whether a member of an undivided family is a coparcener or not would depend upon whether he is entitled to demand partition, and that naturally would in its turn depend upon the question, whether he has a right in the property of the coparcenary by his birth. Broadly stated all members of a joint Hindu family who are not removed more than four degrees from the last holder are coparceners, however much remote they may be from the original holder or acquirer of the property. If a person is removed by more than four degrees from the last holder, he does not acquire any interest in the property of the family by birth, and as such he is not entitled to demand a partition..."

The rights of the male members in the corpus and its income are ascertained on partition, for: "no individual

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[1] See Colebrooke's Digest II,242 (cit.at p.466f. of the decision) 479 (Manu's śl.9,187), 512,515 (cit at p.454 and p.465 of the decision). On p.465 Nanabhai Haridas, J., says: "The rule, then, which I deduce from the authorities on this subject is not that a partition cannot be demanded by one or more than four degrees removed from the acquirer or original owner of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the original owner thereof". On the rights of the great-grandson see also Mayne, op.cit.,328,fn.o. The right of the sons to partition during the lifetime of the father in the Vīramitrodaya has to be read with the earlier statement that partition during the lifetime of the father on the desire of the sons is only possible when certain reasons disqualify the father. See II,341, 305 ff. of Setlur's tr.

[2] 53 Bom.L.R.575.

member of the family, whilst it remains undivided, can predicate of the joint undivided property that he has any definite share".[1] Before partition the interest of a coparcener was said to be fluctuating and liable to be diminished by births or increase by deaths in the family.[2]

(4) Maintenance.

The joint Hindu family as a legal institution does not only consist of the management and enjoyment by and for the coparceners. Their interests are also subject to the 'maintenance' claims of those family members who are not coparceners (or who are disqualified coparceners). Their traditional entitlement to 'food and clothing' amounting in effect to bare subsistence was legally ascertained as including residence, food, clothing, medical attention, education, and marriage and dowry expenses (subject to the Dowry Prohibition Act, No. 28 of 1961).[3] Various expedients and remedies were developed in decisions for which there was no need in the traditional system. From Chunilal v. Bai Saraswati[4] we may cite a useful summary on the rights of maintenance: "The liability to maintain others arises in some cases from the mere relationship between the parties, independently of the possession of any property, and in other

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[1] Appovier v. Ramasubba Aiyan (1866) 11 Moo.I.A.75,83.

[2] Sudarsanam Maistri v. Narasimhulu, (1902-25) Mad.143,156. Mayne, op.cit.,326f.

[3] Derrett, Introd. to Modern Hindu Law, paras. 397-9.

[4] A.I.R. 1943 Bom.393.394.

cases it depends on the possession of property. The first kind liability is placed only on the father, the husband and the sons, and the latter kind devolves on the manager of a joint Mitakshara family, and also on the heir to whom the late proprietor was legally or morally bound to maintain, the reason being that the estate is inherited subject to the obligation to provide for such maintenance". Thus the joint family property remains subject to maintenance even in the hands of a 'sole surviving coparcener', and that even if he sells the coparcenary property and spends the proceeds unless he spends such property for family purposes which have priority over the widow's maintenance claims. The obligation is on the coparcener to prove the application of joint family property for family purposes and if he fails to do so his liability to pay maintenance remains to the extent to the property to which he succeeded.[1] This ruling provides a good example of the development of the traditional right of maintenance at Anglo-Hindu law. The rule prevents the possibility of action of coparceners motivated by fraud and hostility against the non-coparceners.[2]

In the above quotation from Chunilal v. Bai Saraswati we notice the distinction made in Anglo-Hindu law between 'legal' and 'moral' rights to maintenance which seems not

[1]See Chunilal v. Bai Saraswati, A.I.R. 1943 Bom.393.

[2]See Derrett, Introd. to Modern Hindu Law, para.402; id.(ed.), Studies in the Laws of Succession in Nigeria, preface, 8f.

warranted by the śāstra. No doubt the śāstra was silent - to select one instance - about the married daughter's right who was thought to have become a member of her husband's patrilineal gotra. But it could not have been contemplated that - if she was destitute and has become permanently attached to her father's household - she was not entitled to maintenance from the joint family property which was owned by her father and others. Anglo-Hindu law made it only a legal obligation of the heirs of the father to maintain her out of his separate estate.[1] Here modern Hindu law with the Hindu Adoption and Maintenance Act (78 of 1956) brought no improvement and it seems that a married daughter would still have to wait until the death of the father when she would be entitled to a share in his coparcenary interest according to Section 6 (and Schedule) of the Hindu Succession Act (30 of 1956) and would succeed to his separate property, if any, according to Section 8 (and Schedule) of the Hindu Succession Act. At Anglo-Hindu law the widowed daughter-in-law - to cite another instance - had a right of maintenance to the deceased father-in-law's separate as well as to the coparcenary property.[2] But according to Section 19(1) and (2) of the

[1] Ambu Bai Ammal v. Soni Bai Ammal, I.L.R. 1941 Mad.13: A.I.R. 1940 Mad.804(F.B.); Appavu (N.) Udayan v. Nallammal, (1948) I M.L.J.110: A.I.R.1949 Mad.24: for the right of the daughter-in-law. See Derrett, op.cit., para.689.

[2] Ambu Bai Ammal v. Soni Bai Ammal, I.L.R. 1941, Mad.13: A.I.R. 1940 Mad.804 (F.B.). See cases cited by Derrett, op.cit., at para. 271 fn.4.

Hindu Adoption and Maintenance Act (78 of 1956) a widowed daughter-in-law is entitled to maintenance by her father-in-law provided she is unable to obtain maintenance from the estate of her husband or her father, or her mother or from her son or daughter, if any, or his or her estate. Further she is only entitled to maintenance from her father-in-law if he is in possession of coparcenary property and provided she has not received a share.

VI. The Son's Right to Partition.

With the establishment of the High Courts in 1861 and dismission of the court pandits the text of the Mitākṣarā came more clearly into focus and in some respects superseded post-Mitākṣarā developments which had tended to limit the son's rights. The Mitakṣarā (besides the Vyavahāra-mayukha) was then the main source on which the courts administering Mitākṣarā law relied, as translations of the main works of post-Mitākṣarā authors were yet to appear.[1] Perhaps this supported to a certain extent a shift towards a modification of the patriarchal notions, which had influenced case law before 1861 and textbook authors, in favour of the family members whose rights were defined and mobilized. In 1861 the Madras High Court made the right of the male issue to ask for partition from his father absolute, contrary to Sir

[1] See Derrett, Comp. Studies in Sociology and History, 4(1961) 10, at 34 ff.

Strange's view.[1] It was decided that a grandson may irrespective of a circumstance maintain a suit against his grandfather for compulsory division of ancestral family property. Scotland, C.J., and Bittlestone, J., were of the opinion that the passage in ch.I,ii,7 of the Mitākṣarā was applicable to the law governing the division of property generally and ch.I,v, 8 and 11 was applicable to the division of ancestral property. This division would coordinate the rights of the male issue with those of the father. Widespread practice, as we have seen, would not visualize such a right.[2] When the question of the son's right to demand partition came up before the Bombay High Court, it was held that a son is not entitled to ask for partition in the lifetime of his father without his consent in a situation where the father is not separated from his father or brothers and nephews.[3] The majority of the judges refused to recognize the son's unqualified right to ask for partition. The judges took the right of the son only as relating to a situation where he was merely joint with his father; in other words equal right of ownership of father and son in property acquired from the grandfather "does not necessarily imply a separate and independent right by one of the co-owners to have that property

[1] Nagalinga Mudali v. Subramaniya Mudali, (1862) 1 Mad.H.C.Rep.77.

[2] See also Nelson's criticism of the decision in Indian Usage and Judge-made Law in Madras, London, 1887, 210-3, 370-1.

[3] Apaji v. Ramchandra, (1892) I.L.R. 16 Bom.29 (F.B.).

separated from the joint family estate in the hands of several lines of coparceners..."[1] In accord with an interpretation of the Mitākṣarā adjusted to a patrilineal and patriarchal conception of the joint family, Candy, J., reasoned that the general rule of the Mitākṣarā is that a person can get his share of the joint estate only through his father. This presupposes in his opinion that the father must be dead before the son can obtain his share. To this general rule Vijñāneśvara introduces an exception on account of Yājñavalkya's text "the ownership of both father and son is equal in the ancestral estate" in so far a person may compel his father to partition the ancestral property. But it is not a general rule that partition may be enforced by any co-sharer whatever his position in the family may be. "The vested interest which every member of the family acquires by birth is in the whole property. The equality of ownership, which is the principal foundation of the right of a man to demand partition, is that of father and son... It is a mistake to suppose that, because the equal ownership of father and son in ancestral property gives the son a right to demand partition from his father, and requires the shares to be equal, therefore all the rights and liabilities of each must be equal or identical".[2] A further reason which influenced the majority opinion of the judges was the absence of any

[1] Sargent, C.J., at 35.

[2] At p.75.

previous case in the Bombay Presidency in which the principle of partition at will being a right of every member had been advocated.[1] Candy, J., was evidently apprehensive of turning the patriarchal joint Hindu family in the light of which he understood the Mitākṣarā, into a "voluntary partnership".[2]

Telang, J., in his dissentient judgment took the view that the son's right was based on his right by birth and right of ownership and that the general principle in the Mitākṣarā was that where there is joint ownership there is also the right to partition.[3] The son's right was based on his apratibandha dāyādaship and was independent and entirely unaffected by the father or any other person being alive or dead and hence classes as 'unobstructed' in contradistinction of those which are dealt with under the head of "obstructed heritage".[4] The mere absence of such claims as made in the case of Apaji v. Ramchandra did not impress Telang, J.[5]; nor did he appreciate the consideration of the "general prevalence, of the institution of undivided families in Hindu society".[6]

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[1] Candy, J., at 79; see also Sargent, C.J., at 35.

[2] The influence of Sir Henry Maine and his overstatement of the influence of patriarchy in India is noticeable when the learned judge refers to a passage of Maine's Dissertations on Early Law and Custom (London, 1883) where the author says (263): "I have frequently observed the unintended disintegration of the Indian joint families by the operation of Anglo-Hindu law".

[3] At 36.

[4] At 40.

[5] At 55.

[6] At 56.

The judgment of Telang, J., represents the general trend away from rigid patriarchal notions. The interest by birth became coincident with a right to demand partition. Outside Bombay the right to demand partition against the managing member or other coparceners became well-established.[1] We suggest that the development was in accord with the joint Hindu family as a modern institution. The threat of a son demanding partition from his father and other coparceners provides a check on arbitrary alienations of joint family property by the manager. The inference that the joint family would disintegrate is not necessarily true.

Appaji v. Ramchandra which is still an authority in Maharashtra and Gujerat has been recently resented in Jaswantlal v. Nicchabhai,[2] but could be distinguished on the particular facts of the case. The case concerned a suit for partition of joint family property by metes and bounds. Mody, J., was not ready to extend the principle of Appaji's case which concerned primarily a severance of status. It is to be hoped that the Supreme Court will eventually overrule Appaji's case.

VII. Self-acquisitions.

(1) Self-acquisitions of the Father.

We have noted previously that the Smṛti-candrikā had negatived the son's right to control the father's alienation

[1]See cases cit. at Mayne, Hindu Law and Usage, 520 fn.4.
[2]A.I.R. 1964 Guj. 283 at 285(b).

of self-acquired immoveable property.[1] This was contrary to the text of Vyāsa and its reception by Vijñāneśvara.[2] Elsewhere Vijñāneśvara had provided an alternative by saying that the son had to acquiesce in the father's disposal of immoveable self-acquired property.[3] The father's right to alienate self-acquired immoveable property freely was doubted by the Madras High Court,[4] and negatived by the High Court of the North Western Provinces (Allahabad)[5]. But eventually all the High Courts decided in favour of the father's power.[6] The Privy Council in Rao Balwant Singh v. Rani Kishori[7] settled the question finally and held that the father has full power of disposition over his self-acquired immoveable property. The Judges followed W.H. Macnaghten's distinction between moral and legal rules[8] which was in turn derived from the theory peculiar to Bengal authors. The reason added to the precept of Vyāsa cited in the Mitākṣarā (I,i,27) was taken as an indication that the

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[1] See above, 305 .

[2] Mit.I,i,27. See above, 269 .

[3] I,v,10.

[4] Tarachand v. Reeb Ram, (1866) 3 Mad.H.C.Rep. 50,55: "It is by no means clear upon the authorities that he (the acquirer) can even by gift inter vivos deprive them (the male issue) of their right to share even in his self-acquired real property and we apprehend that it is perfectly clear that such male issue would be absolutely entitled to it at death".

[5] Mahasookh v. Budree, (1869) 1 N.W.P., 153.

[6] Cases cited at Mayne, op.cit., 450.

[7] (1898) 25 I.A. 54: I.L.R.20 All.267.

[8] Principles and Precedents of Hindu Law, I, p.vi.

Vyāsa's text could not be a positive rule of law.[1] Their Lordships stated: "All these old text-books and commentaries are apt to mingle religious and moral consideration".[2] This solution brought the law in de-facto consonance with the view adopted in the Smṛti-candrikā.[3] Besides it provides an illustration of how Anglo-Hindu law consolidated the law which in the traditional system was differently settled in legal texts and which as customary law varied from caste to caste.

(2) Self-acquisitions as a Separate Entity.

In the traditional śāstric system self-acquisitions of the undivided agnates of the family were part of the common estate until exempted at partition. This was not clearly stated by early textbook writers on Anglo-Hindu law who styled the father's self-acquisitions as separate property.[4]

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[1] Vyāsa: "They, who are born, and they who are yet unbegotten and they who are still in the womb, require the means of support, no gift should therefore, be made". This passage lends merely - in traditional outlook - convincing emphasis on the preceding rule by Vyāsa not to alienate one's self-acquired property.

[2] Rao Balwant Singh v. Rani Kishori, (1898) 25 I.A.54, 69.

[3] See above, 306 .

[4] See e.g. Strange, Hindu Law, I,17. See also the interpretation of Manu's text 9,209 at Mayne, Hindu Law and Usage, at 313 fn.u. Manu's view indicates in our view clearly that the father is at liberty to divide or to exempt at partition the ancestral property recovered by him. Mayne believed that the text "contemplates the continuance of the coparcenary, not its dissolution, and points out what property falls into the common stock and what does not". The possibility of self-acquisitions not being part of the 'common property' could only arise in the Dāyabhāga.. See Dh.K. 1213b, 1214a.

The attitude to consider self-acquisitions as a separate entity before partition was probably strengthened by the growth of testamentary power. When a person dies intestate his self-acquired property would remain part of the common property belonging to his undivided sons. Similarly when X who is sonless and joint with collaterals died, his self-acquisitions would remain part of the property of his collaterals. There was no question of the self-acquisitions 'devolving' by 'succession' to X's widow and the ancestral property being taken by the brother by 'survivorship'. But gradually the notion was accepted that 'self-acquisitions' were ipso facto separate. When the point was examined by the Privy Council in Katama Natchiar's case[1] it was overlooked that in the Mitākṣarā the devolution of property did not depend on the nature of property, but on the status of the deceased. It was decided that where a man dies without male issue, but undivided from his brother and nephew, and had left self-acquired property such property passes by descent to his widow to the exclusion of the son of the predeceased brother. We should note that when the case had been referred to the pandits in 1833 they had taken the view that the brother's son was entitled to the property.[2] This still reflects the

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[1](1863) 9 Moo.I.A. 539, 610ff.

[2]550 ff.

traditional position.[1] In their Lordships' view the Mitākṣarā dealt only with the case where the property "has been either wholly the common property of a united family, or wholly the separate property of the deceased husband".[2] We know now why the Mitākṣarā had not visualized the third position.[3] Their Lordships placed the burden of proof upon the respondent to show that "separately acquired property", though the owner was joint in status, did not descend as separate property, i.e. by succession. The respondent argued that separate property did not descend as separate property, because there was "a general state of coparcenaryship as to the family property". The respondent thus thought that the status of the person is decisive for his claim to the self-acquired property, though even he admits that the coparcenary does not extend to self-acquired property. In the words of their Lordships: "Again it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if

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[1] See also Leon Sorg: Avis du Comité consultatif de jurisprudence indienne, p.160 (avis no. 57-18th May 1837): X dies joint with Y leaving a widow W. X leaves self-acquired property. W is entitled only to maintenance. According to Sorg (writing in 1898) the rule was abandoned. Sorg's remark at p.21 shows that the distinction between joint and separate property was relatively recent and that the failure to distinguish persisted even at that time among certain families, particularly in the country districts. See also West, A Digest of the Hindu Law, 4th ed., 699 fn.t.

[2] At 610.

[3] See above, 268 . J.D.M. Derrett, "The Right of the Separated Son", Supreme Court Journal, 19 (1956) 103.

the acquirer leaves male issue it will descend as separate property to that issue down to the third generation". These dicta reveal a misunderstanding by the Privy Council. However they show that even the respondent himself thought that the self-acquired property forms a distinct entity for purposes of succession. His argument that jointness as to the family property should prevent self-acquired property from "taking the general course of law" i.e. from descending by succession, seems inconsistent.

In what follows in the decision a share received at partition is referred to and described as descending as separate property and it is a fortiori concluded that the same rule applies "to property which from its first acquisition has always been separate". From this the important principle is derived that the "law of succession follows the nature of the property and of the interest in it".[1]

(3) The Right of the Separated Son in Self-acquisitions of the Father.

The rule laid down in Katama Natchiar's case which says in effect that self-acquisitions were a separate entity and pass by succession was generally not applied or ignored in connection with the rights and relationship between a father and a separated son. Some High Courts held that the right of the undivided son to take his father's self-acquisitions

[1] At 614.

in preference of the separate son is based on the right of survivorship.[1] In Oudh on the other hand the logical implications of Katama Natchiar's case were followed.[2] Stuart, C.J., and Srivastava, J., ruled that sons who have remained united with the father cannot claim any preference as against the son who has previously separated, as regards succession to the self-acquired property of the father. They follow the implications of the rationes of Katama Natchiar's case and point to the consequences of the case of Rao Balwant Singh v. Rani Kishori.[3] These cases make it impossible in the opinion of the judges to apply the rule of survivorship to the self-acquired property of the father. In Ganesh Prasad v. Hazari Lal[4] Collister, J., ruled that "succession to ancestral property and inheritance of self-acquired property are on entirely different footing. In respect to ancestral property, there is community of interest, unity of ownership and unity of possession among the undivided coparceners, and succession is by survivorship among coparceners". But then he bases the preference of the unseparated over the separated son again on the original Mitākṣarā position according to which the status of the claimants in respect of the

[1] Fakirappa v. Yellappa, (1898) I.L.R. 22 Bom.101; Nana Tawker v. Ramachandra, (1909) I.L.R. 32 Mad.377.

[2] Badri Nath v. Hardeo, AIR. 1930 Oudh 77.

[3] (1898) 25 I.A.54.

[4] A.I.R. 1942 All.201 (F.B.)

father was decisive. The sons were said to have "a certain right or interest by birth" in the self-acquired property of the father, though it was considered to be very different from the right which they have in ancestral property, and consists in a moral and spiritual injunction upon the father not to squander the property to their detriment.[1] Bajpai, J., held that there is still a coparcenary in the wider sense of the term and the divided son not being a member of the coparcenary can take no share in the self-acquired of the father.[2] Hamilton, J., in a dissentient judgment held to the contrary.

The reasons why the majority of courts did not follow the implications of Katama Natchiar's case - which amounted in our opinion to the abrogation of the birthright in respect of self-acquisitions of the father, especially also in view of Rao Balwant Singh's case and the introduction of testamentary power over self-acquisitions - may be seen in the fact that the Privy Council did not deal with the apratibandha dāyādaship. This as we know implied the son's vested rights in all the deceased father's property including self-acquisitions. Katama Natchiar's case dealt specifically with the right of the widow of a sonless propositus who was joint with collaterals. When the case of the separated son came before the courts the Mitākṣarā was re-examined because the matter was thought res integra and the principles in Katama

[1] 205.
[2] 212.

Natchiar's case were lost sight of.[1] The underlying reasons which guided some of the decisions were based on the view that a superior right or virtue attached to uninterrupted unity with the father in consequence of which the divided sons are postponed to the undivided sons. This was believed to be in accordance with "Hindu sentiments and the spirit of Hindu law".[2] But the possibility that psychologically and economically Hindus were not prepared to the full implications of the rationes in Katama Natchiar's case did not - one should have thought - abolish the law as laid down by the highest judicial authority.

Moreover the situation was obviously unjust where the father separated the son himself and the separated son was prevented from taking a share in the deceased father's self-acquired estate. The anomalous position was removed by

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[1] Ranade, J., in Fakirappa v. Yellappa, (1898) I.L.R.22 Bom.101, held that Katama Natchiar's case did not apply to the facts of Fakirappa's case. Here a grandson had sued his grandfather and uncles for partition. He obtained a decree as to all joint family property, but failed as to a share in the separate property of the grandfather. On the death of the grandfather he brought a fresh suit for a share of this separate property. It was decided that "as between united sons and separated grandson, the succession on the grandfather's death to the property, both ancestral and self-acquired, left by him goes in preference...to the united son".

[2] Collister, J., in Ganesh Prasad v. Hazari Lal, A.I.R. 1942 All. 201 at 208. See also Ranade, J., in Fakirappa's case, (1908) I.L.R. 22 Bom.101 at 104: "The nature of the self-acquired property can make no difference in this connection more especially where the grandson enforces his partition against his grandfather's and uncle's will".

Section 6, expl.2, of the Hindu Succession Act, 1956: a person separating himself from the coparcenary before the death of the deceased or any of the heirs cannot claim on intestacy a share in the interest of the deceased. This would not apply in a case where the father had separated a son and subsequently makes self-acquisitions. Here the separated son would be entitled to a claim in the self-acquired estate of the deceased.

VIII. Apratibandha Dāya and Sapratibandha Dāya at Anglo-Hindu Law.

In whatever manner the mode of devolution of self-acquisitions of a father was conceived in decisions, i.e. whether self-acquisitions devolved by "survivorship" or "succession", there was no dispute that sons joint with their father take the self-acquisitions of their father as joint family property subject to all incidents of coparcenary as between them and their descendants.[1] Further it was established that the right to take by survivorship could only occur in a coparcenary. The question was however which mode of devolution applied to property deriving from non-

[1] Mt. Ram Dei v. Mt.Gyarsi, A.I.R. 1949 All.545(F.B.); on the mode of devolution of the self-acquisitions see Fakirappa v. Yellappa, (1898) I.L.R. 22 Bom.101, Nana Tawker v. Ramachandra, (1909) I.L.R. 32 Mad.377: an undivided son takes his father's self-acquired property by survivorship. Vairavan v. Srinivasachariar, (1921) I.L.R. 44 Mad.449(F.B.): by succession. But see Narasimhan v. Narasimhan, (1932) I.L.R. 55 Mad.856. Gupte, Hindu Law in British India, 107.

coparceners e.g. the maternal grandfather. Moreover the problem was whether such property became coparcenary property with all incidents attached to it or on what tenure such property was held by heirs related to the propositus in equal degree and being members of an undivided family. In the case of Godavari Lakshminarasamma v. G. Rama Brahman[1] the question was answered thus: "(27)... no property or interest in property of one person is taken by another by survivorship unless the latter has already an interest in the property by reason of his relationship. This can only be in apratibandha daya, in which there is always a right by birth... (28)...in property inherited by two or more persons from their maternal grandfather there can be no right by survivorship in this sense, for the daughter's sons, whether they be sons by the same daughter or by different daughters, did not possess from the time and by reason of their respective births any interest in the property of their maternal grandfather while he was alive..." The conclusion arrived at was that the widow of one of the two brothers, who inherited property from their maternal grandfather is entitled to his share in the absence of male issue, as the rule of survivorship does not apply and the brothers had taken the property as their separate property, i.e. as tenants-in-common.

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[1] A.I.R. 1950 Mad.680.

This solution, of course, seems not in accord with strict Mitākṣarā law. Separate property was then not known before partition. Moreover the daughter's sons had an interest in their maternal grandfather's property by the very definition of dāya, though their ownership was under an obstruction. Certainly any accretion of property during jointness became part of the samudāya until partition. I.S. Pawate arrives at an opposite conclusion to that of the Madras High Court.[1] He refers to an early Privy Council case[2] where it was held: "The Calcutta decision appears to their Lordships to have been based upon a view of the Mitakshara law which further investigation shows to be erroneous; namely, upon the view that according to Mitakshara law, the doctrine of survivorship is limited to unobstructed successions and to the succession to the joint family property of reunited coparceners."

Pawate points out that the Mitākṣarā does not contemplate dāya to descend in defined shares to heirs standing in the same relationship to the owner, contrary to the approach in the Dāyabhāga law. The co-heirs acquire a right over the whole property and when one of them dies before there is any partition of the property inherited, the rule of survivorship comes into operation. Vibhāga includes both 'inheritance' and

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[1] Daya-vibhaga, 184.

[2] Venkayyamma Garu v. Venkataramanayyamma Bahadur Garu, (1902) I.L.R. 25 Mad. 678, at 687.

'partition'. Vibhāga in the former case is the arrangement of ownership having for their ownership an aggregate of things by placing the property under the head of individuals. The property in our case is accordingly placed under the ownership of the two daughters' sons. If they wish to enjoy the property with full independence they may make a vibhāga ('partition') by restricting their rights vested in the whole property to a particular part of the whole. If one of them dies before partition the property accrues to the other co-heir by survivorship to the exclusion of the widow of the deceased.

The solution offered by Pawate is logically implied in the Mitākṣarā, yet it is questionable as far as the assumption of survivorship in the case of 'inheritance' or 'sapratibandha dāya' is concerned; some authors writing after Vijñāneśvara tended to mitigate the implications of the Mitākṣarā definition of dāya and ignored that there was any pre-existing right in respect of sapratibandha dāya. They seem to imply in their approach that the sapratibandha dāyāda would not be owner "solely" by birth or relationship but by the additional cause of demise of the owner.[1]

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[1]See Madana-ratnapradīpa, 323f., Vyavahāra-mayūkha, 93; sapratibandha - the life of the owner is an obstacle to ownerahip; apratibandha- ownership accrues solely by relationship. See Vijñāneśvara himself who turned strictly against the view that e.g. separated dāyādas should continue to have any mutual rights. I,i,30.

We suggest that the introduction of the notion of 'succession' was no radical departure from the Mitākṣarā. Moreover once separate property was recognized as an entity, there was no reason why property inherited from others than paternal ancestors should become joint family property. But it was open to doubt whether e.g. the two daughters' sons inheriting from their maternal grandfather should become tenants-in-common and not joint tenants with the right to take from each other by survivorship. But the principle of joint tenancy was said to be unknown to Hindu law except in the case of joint property of an undivided family governed by Mitākṣarā law.[1] In Muhammad Husain Khan v. Babu Kishva Nandan Sahi[2] it was held that 'ancestral property' is that property which is derived from father, father's father, and father's father's father. Property which is inherited from any other person is not 'ancestral' i.e. it is separate property without the incident of survivorship. The inevitable consequence was to hold that the daughter's sons take as tenants-in-common, and that the widow of one brother would take as if her husband had been separate and not joint.[3]

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[1] Mt. Bahu Rani v. Rajendra Baksh Singh, A.I.R.1933 P.C.72.

[2] 64 I.A.205: (1937) II Mad.L.J.151 (P.C.).

[3] Godavari Lakshminarasamma v. G. Rama Brahman, A.I.R. 1950 Mad.680.

CHAPTER X

The Incidents of the Joint Family and their Development according to Case Law and Legislation.

I. ACQUISITION.

(1) Self-acquisitions. The Doctrine of "Merger".

As a result of the new concept of self-acquisitions being an entity distinct from joint family property, coparceners could now also have transactions between each other. In the śāstra this could not have been contemplated before partition had taken place. The early recognition of self-acquisitions as a separate entity was in fact favourable to the development of the joint Hindu family as legal institution. It encouraged individual enterprise without necessitating disruption of jointness. A further progress in this context was the concept of merger, i.e. the blending, or renouncing, or releasing of separate property by the acquirer so that it would become coparcenary property. "Merger" of self-acquisitions did not presuppose any nucleus of coparcenary property. In their search for a śāstric base of this doctrine the courts were less successful, because the question of merging self-acquisitions could not arise during jointness. Only at partition one could renounce one's self-acquisitions by not claiming exemption from partition. In Shiba Parsad v. Rani Prayag Kumari Debi[1] a passage from

[1] I.L.R. 59 Ca. 1399: (1932) 59 I.A.331.

the Mitākṣarā as cited in Goorochurn Doss v. Goluckmoney Dossee[1] was taken as the basis of the doctrine. The passage obviously relates to a partition and presupposes that acquisitions become ipso facto part of the common stock; there is no question of the acquirer having "merged" his acquisitions with the common stock: "Among unseparated brothers, if the common stock be improved or augmented by any of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer".[2]

The P.C. however took the text to mean that property had been merged by the acquirer and their Lordships in the words of Sir Dinsha Mulla derived the following conclusion: "...a Hindu possessing self-acquired property may incorporate it with the joint family property in which case it will pass on his death not to his heṛis, but to the surviving members of the family".[3]

Nevertheless the result, though perhaps technically wrong, was an inevitable and necessary advance from pure Mitākṣarā law.

It is noticeable from the facts of decisions that traditional attitudes continue to linger in so far as self-

[1] 1853 Fulton, 165, 173-4.

[2] Mit. I, iv,31.

[3] Shiba Prasad Singh v. Rani Prayag Kumari Debi, (1932) 59 I.A.331, 349.

acquisitions are usually felt to be or treated as part of the common property for some purposes or that the property is allowed to be used out of generosity or is utilised for family purposes. On the other hand property might be suddenly claimed as separate by the acquirer who had previously treated it quite obviously and unambiguously as part of the joint family property. In answer to such situations the courts proceeded to strengthen the concept of self-acquisitions as a separate entity by insisting on the actual intentions of the acquirer being proved in the light of all circumstances of the cases.[1] The burden of proof thereby is always on the party pleading conversion of self-acquisitions into joint family property.[2] Mere generosity and allowing to use will not permit the inference that the separate right had been waived. Thus a member of the joint family who acquires property may allow other members of that joint family to manage it or to enjoy the income arising out of it, but this circumstance alone cannot militate against the presumption that such property acquired by a member out of his own earnings constitutes his self-acquisition.[3] We believe that these decisions had the

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[1] Lal Bahadur v. Kanhaia Lal, (1906) 34 I.A.65: I.L.R. 29 All. 244; Suraj Narain v. Ratan Lal, (1917) 44 I.A.201: I.L.R. 40 All. 159.

[2] Narayanan Neelkutty v. Krishnan Venki, A.I.R.1935 T.C.199.

[3] Prätab Kishore v. Gyanendranath, A.I.R. 1951 Ori. 313,319. Mallesappa v. Mallappa, A.I.R. 1961 S.C. 1268.

effect of preserving the institution of the joint family. A presumption e.g. that all self-acquisitions are joint would force acquirers to manifest their intentions strongly and unambiguously. This would not necessarily contribute to the unity and harmony within a joint family. On acquiring property a family member may even see himself forced to separate from the family in order to treat his self-acquisitions as separate beyond doubts.

(2) What constitutes self-acquisitions?

The Mitākṣarā followed a strict course as regards what followed a strict course as regards what would be impartible at a partition. Only that property which was acquired 'without any detriment to the goods of father or mother' became impartible.[1] Community of ownership between husband and wife had lost its importance in the śāstra and Anglo-Hindu law inherited this position. Consequently the phrase 'to the goods of the father or mother' was ignored and the subject was treated only with reference to property acquired without detriment to the estate of the father, such property typifying joint family property.

As regards gains of learning the position in the Mitākṣarā had been that if they were earned at the expense of the family estate they were partible.[2] Jīmūtavāhana on

[1] Mitākṣarā I, iv, 2.

[2] Mit. I, iv, 1,6.

the other hand had held that gains were only partible if they were as such acquired with the aid of joint family funds and if the learning was acquired at the expense of joint family funds.[1] Perhaps the strict attitude of the Mitākṣarā has to be understood in the historical context. Gains of learning related mainly to brāhmaṇical occupations and predecessors of Vijñāneśvara from the North had taken a liberal view of the right to exempt such acquisitions.[2] At the time when Vijñāneśvara wrote, the new brāhmaṇical families from the North were dependent on the acquisition of each member of the family. Moreover Vijñāneśvara incorporates many local customs of other communities commercial or agricultural amongst which was the attitude to recognise only few categories of self-acquisitions as impartible so that even gifts were deemed partible.[3] The attitude to connect individual family members' self-acquisitions with the whole family is widespread in customary law and Vijñāneśvara took account of this 'established practice'.[4]

The approach of the Mitākṣarā may have served the sociological and economical requirements of the traditional agricultural commercial and even the professional atmosphere, but in the face of modern differentiations of professions

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[1] Dā.bhā. VI,i,44-50.

[2] See Medhātithi on Manu 9,204 and 206 (Jha's tr.,vol.5,169 f).

[3] Mit. I,iv,7: pratigraha.

[4] Mit.I,iv,9: ācāra-viruddham.

the application of the Mitākṣarā was felt as an impediment. The fact that the Mitākṣarā was enforced as the standard authority which did not easily permit of the use of "lesser" authorities inevitably led to unsatisfactory results.[1] The imposition of the Mitākṣarā has also suppressed customary attitudes which - difficult to prove as custom - might have become valuable incidents of joint family law. Thus e.g. the custom of managing one's undivided share in the joint family property separately though survivorship would apply.[2]

The situations was that gains made after any type of education without consideration of what had been received from family funds in pursuing education would be held to be joint family property.[3] Some decisions tried to mitigate the strict Mitākṣarā rule. The attempt to improve the situation by legislation failed because of the cautiousness of

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[1] The Vivādaratnākāra which is an authority in the Mithila school has detailed provisions on gains of learning which are much more liberal than the Mitakṣara rules and might have been profitably used. See Vi.ra. on Nār. 13,11 (text no. 1419, p.50 f.;) see also Kṛtya-kal.,675. The fact that such texts were not made use of is ascribed to their not being available in translation during the last century as well as to their "regionalization" (Derrett.).

[2] See on the custom Derrett, Contr. to Ind. Soc., 6 (1962) 18ff., at 45.

[3] See cases cited at Mayne, Hindu Law and Usage, 354f and fns.

the administration.[1] The same cautiousness guided the judgment of Lord Sumner in Gokal Chand v. Hukam Chand[2], a case which concerned the salary of an Indian Civil Service Officer who was an unseparated member of a joint Hindu family carrying on a joint ancestral business as money-lenders. The appellant's salary was held to be partible property since it resulted from a special educational training and the appellant had not discharged the onus of proving that that training was not at the expense of the joint family. Their Lordships regretted the incongruity "of applying to such an occupation as Mr. Gokul Chand's an ancient rule which had its origin in a state of society possibly simpler than and certainly different from the state of society existing in the present day..."[3] Their Lordships relied on the early case of Luximon Row[4] in which gains were held to be joint family property although the causality between the ancestral property and the actual earnings by the acquirer as a Prime Minister was negligible. They also relied on Chalakonda Alasami v. Ratnachalam[5] where the adoptive mother of a devadāsi claimed the jewels and other property acquired by the daughter. The acquisitions were held to be the property of the family on the principle

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[1] See Shepard, "Hindu Law and Anglo-Indian Legislation", Law Qly. Review, 18 (1902) 172 ff.

[2] (1921) 48 I.A. 162.

[3] At 174.

[4] (1831) 2 Knapp 60: 5 W.R.67 (P.C.)

[5] (1864) 2 Mad.H.C.R.56.

applicable in the Mitākṣarā families. There had been a nucleus of property without which the daughter could not have earned and acquired property. Their Lordships in Gokul Chand's case further concluded that there is no valid distinction between a direct use of the joint family funds and a use which qualifies the member to make the gains by his own efforts. They thought it highly important that "no variations and uncertainties are introduced into the established Laws affecting family rights and duties connected with ancestral customs and religious convictions".

Meanwhile the efforts for legislation had gathered momentum and in 1930 the Hindu Gains of Learning Act (30 of 1930) was passed without difficulty. The Act provided (in effect) that earnings which have been gained as a result of training or education with the aid of joint funds by way of salary, wages or any other income due to learning would be separate.[1]

The consequence of the Act was that to a great extent acquisitions fell outside the partible assets of a family. But otherwise Gokul Chand's case remained the basic authority for the proposition that acquisition with the expenditure of or with the detriment of any nucleus of joint family property, however small, are available for partition. A series of cases tended to move away from the strict rule in

[1] See Ramakrishna v. Vishnumoorthi, A.I.R. 1957 Mad.86. Derrett, Introduction to Modern Hindu Law, para.547.

Gokul Chand's case.[1] The question what was detriment was too liberally answered in some decisions and the rule that whatever is earned by or as a result of the use of joint family funds, whether directly or indirectly, falls into the common stock, was at times neglected. The Supreme Court has stopped this tendency. Thus where a manager of a joint family floated a company with the intention to take over the company as a going concern and was appointed managing director, and finance was supplied at all stages out of joint family funds, it was held that the managing director's remuneration was the income of the joint family.[2] In a subsequent case the Supreme Court took a similar strict view: a manager of joint Hindu family had taken out insurance policies for his own family[3], and Hidayatullah, J., was satisfied that there is no scope for inference either in law or in fact, that the premia paid ceased to be the assets of the joint family and became the share of the income of the individual. It was held that there is no proposition in law by which insurance policies must be regarded as the separate property of the coparceners on whose lives the insurance is effected by a coparcener and that proceeds of an insurance policy do not belong to the joint family.[4]

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[1] See cases discussed by J.D.M. Derrett in "The Supreme Court and acquisition of joint family property", 62(1960) Bom.L.R. (Journ.) 57-71.

[2] Comm. of Income Tax v. Kalu Babu Lal Chand, A.I.R.1959 S.C.1289.

[3] Smt.Parbati Kuer Sarangdhar Sinha, A.I.R.1960 S.C.403.

[4] At. p.404.

In M/s. Piyare Lal Adishwar Lal v. Commissioner of Income-tax, Delhi[1], the Supreme Court took a more flexible line; the judges in fact distinguished Kalu Babu Lal Chand's case[2] when confronted with a situation where a manager of a Hindu joint family had been appointed the treasurer of the Central Bank of India after he had furnished securities to the bank of certain properties of the undivided family. The question was again whether the salary and emoluments received by the manager as the treasurer of the bank were joint family property. Their Lordships took the view that they were not, because there was nothing to show that the manager had received any particular training at the expense of the joint family funds or his appointment was the result of any lay-out or expenditure or of detriment to the family property.

These few illustrations may suffice to demonstrate that as regards gains of learning necessary advancements from the strict Mitākṣarā rule were made which did not necessarily have the effect of the breaking up of the joint family. The acquirer retained the possibility of merging his self-acquisitions with the joint family property. Perhaps these rules were well suited to the needs of modern joint family life. The satisfaction derived from the possibility of letting one's relatives use the self-acquisitions

[1] A.I.R. 1960 S.C.997. See also Padmini Chandrasekaran v. S. Somasundaram Chettiar (1965) II M.L.J. 65

[2] A.I.R. 1959 S.C. 1289.

is a common feature of Indian joint family life and is supported by decisions rather than destroyed. On the other hand as far as acquisitions are concerned which are not the result of a special education or training the Supreme Court have interpreted old Mitākṣarā notions strictly but with consideration to the facts of modern life.

(3) Joint Acquisitions without Nucleus.

This expression was used [illegible] to denote property acquired by the joint labour or joint exertions of coparceners without the aid of joint family property consisting of ancestral property and accretions. The question arose under which circumstances property acquired in this manner could be considered joint family property.

It seems that the śāstra knew the possibility that property would be acquired by some or all of the undivided brothers (dāyādas) without the aid of the paternal property. Such property could be claimed by the acquiring brothers at a general partition just as individuals could exempt their self-acquisitions. The acquisitions were held between the acquirers and their issue, i.e. not on a joint tenancy as in English law.[1] In Anglo-Hindu law joint acquisitions

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[1] Aparārka on Yājñ.2,120 (726 f.), on 2,135-6 (at 743), and ibid.(at 744) on Śaṅkha-Likhita-Paiṭhīnasi. See above, . Yājñ. 2,120b indicates that at the death of a brother his interest does not go by 'survivorship' to the brothers as in a joint tenancy but that he is represented by his male issue who take his interest like in coparcenary.

2. See Derrett, Intr. to Modern Hindu Law, para. 548

without utilising any coparcenary nucleus were ab initio separate and unlike in the śāstra not coparcenary property. The acquirers have to merge their acquisitions in order to impress them with the character of joint family property. In Sudarsanam Maistri v. Narasimhulu Maistry,[1] a father and his five sons constituted an undivided family. The father and three elder sons lived apart from the two youngest sons. The latter had acquired property jointly. The youngest brother sued his elder brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of his brother and himself. It was argued inter alia that acquisitions were partible as joint family property between the two brothers. Bhashyam Iyengar, J., had occasion to expound the conception of the joint family at Anglo-Hindu law while dealing with this question. Leaving out the discussion of the rights of the female members as not necessary for the solution for the particular question he said: a Hindu joint family is purely a creation of law and cannot be created by act of parties save in the case of adoption where a stranger may be affiliated as a member of the corporate family. The conception of a Hindu joint family is a common male ancestor with his lineal descendants in the male line. There may be one or more families all with one or common ancester within the

[1](1902) 25 I.L.R. 149.

larger joint family and each family with a separate common ancestor. The main family may own 'unobstructed heritage' with accretions and the branches of such a family each forming a corporate body within a larger corporate body may possess separate 'unobstructed heritage' which with its accretions may be exclusively owned by such branch. Property acquired without the aid of joint family property - by one or more individuals members - whether they belong to different branches or to one and the same branch of the family - may by agreement be incorporated with joint property of the main family or one of its branches. If property has been acquired - even if the undivided family is not possessed of any ancestral nucleus of property - it can be impressed with the character and incidents of unobstructed heritage or joint property belonging to the main family or to any of its branches. But the question whether such property would be held by the acquirers as co-owners and not as joint family property would depend on their intention.[1] But if property was acquired by all the members of the undivided family, by their joint labour, it would in the absence of any indication to the contrary be owned by them as joint family property.[2]

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[1] At p.155.

[2] At p.156.

In Bhagwan v. Reoti[1] the nature of joint acquisitions of some members of the joint family was again the subject matter of discussion. Subba Rao, J., summarised the position as follows:

> "Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate unit of a family unit. The law also recognises a branch of the family as a subordinate corporate body... One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or the property so acquired can be thrown in the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would not be governed by the law of the joint family but only of the law of inheritance. In such a case, if a property was acquired jointly by them, it would not be governed by the law of joint family; for Hindu law does not recognise some of the members of a joint family belonging to different branches, or even to a single branch as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to H.l. except in regard to cases specially recognised by it..."

Some of the text books and decisions speak loosely of a 'presumption' that joint acquisitions without the aid of a nucleus are joint family property. There is however no presumption in law. Especially the case of Sitalprasad v. Rampersad[2] creates the impression that property acquired by

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[1] (1962) 1 S.C.J.348.

[2] A.I.R. 1943 Nag. 321.

a coparcener jointly with his brother without the aid of any nucleus of joint family property would be presumed to be joint family property. But this case seems to be based on a misquotation of Rampershad v. Sheo Churn[1] which is based on the presentation of the case in Mulla's Principles of Hindu Law[2]. The actual words in Rampershad's case are: "There is nothing prima facie improbable in the hypothesis that he (one of five brothers living together as a Hindu joint family) brought his earlier gains voluntarily into the common stock making them the capital on which he and his brothers were to trade. All further gains made by their joint exertions would be ... impartible..."

Thus there is no presumption in law, but there are certain circumstances which prima facie admit the inference, at times loosely called 'presumption' in decisions that joint acquisitions without the aid of any nucleus of joint family property become joint family property. E.g. the fact that the family lives jointly, is joint in food and worship and has a common stock in which the acquisitions are kept may allow such an inference of intention.[3] A course of conduct in accordance with such fact over a prolonged period would justify the inference that the property was

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[1](1865) 10 Moo.I.A.490.

[2]See 12th ed., 334f.

[3]See e.g. Laldas v. Motibai, (1908) 10 Bom.L.R.175.

intended to be impressed with the character of joint family property. A presumption as contained in the dicta of the Nagpur case would be the against the nature of the joint Hindu family as a developing institution. The possibility that some members may unite in earning property which is separate from the joint family property, without thereby breaking up the wider unit of the joint family facilitates the adaptability of the institution to modern modes of acquisition in trade and commerce and industry. It permits initiative of individuals with the framework of the joint family.

(4) Wills and Gifts by the Father in respect of his Self-acquired Property.

Before we conclude our remarks on self-acquisitions we must make short reference to the case of Arunachala v. Muruganatha[1]. This case completed the development initiated by Rao Balwant Singh v. Rani Kishori[2] in recognising the father's complete control over his self-acquisitions. The question which was settled by the Supreme Court arose in connection with gifts (or testamentary bequests) made by a father to a son in respect of his self-acquired property. Did the male issue of the donee obtain an interest in such property? The Mitākṣarā would declare gifts received through

[1] A.I.R. 1953 S.C.495.

[2] (1898) 25 I.A.54.

favour of the father (pitṛ prasāda labdha) exemptible at partition[1], though the son's male issue would acquire an interest by birth in such property. The Calcutta High Court had held that such property becomes ancestral property in the hands of the son's son as if he had inherited from his grandfather.[2] The Madras High Court had held that it is undoubtedly open to the father to determine whether the property which he has bequeated shall be ancestral or self-acquired but unless he expresses his intention that it shall be self-acquired, it should be held to be ancestral.[3] The Bombay High Court took the opposite view: there must be a clear expression of intention on the part of the donor to make it ancestral otherwise the gifted property would be held the self-acquisitions of the donee.[4]

The Supreme Court came to the conclusion that as a father has complete powers of disposition over his self-acquired property it must follow as a necessary consequence that a father is competent to provide expressly that the donee would take a gift exclusively for himself or that the gift would be for the benefit of his branch of the family. There is no presumption that the gift is ancestral or separate in the hands of the donee.

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[1] I, i,19; I,iv,28.

[2] Muddun v. Ram, (1863) 6 W.R.71.

[3] Nagalingam v. Ram Chandra (1901) I.L.R. 24 Mad.429.

[4] Jugmohun Das v. Mangal Das, (1886) I.L.R. 10 Bom.528.

II. MANAGEMENT AND ALIENATION.

(1) The Alienation of the Undivided Interest.

The śāstric position as regards the alienation of the undivided interest in joint family property has been outlined in the preceding chapter. That is in the Maithila school - as well as generally in the Mitākṣarā school - there was no possibility to alienate a share or specific property which was part of the sādhāraṇam dhanam. When a part of the common property was alienated it was considered as "ungiven" (adatta). When a debt was incurred for individual purposes the coparcener had to pay the debt out of his own property or after partition from his share.[1] The Gentoo Code records as the opinion of the Maithila pandits that the alienation of the undivided interest was possible after it had been ascertained at a partition. (See above, .) Even Jagannātha could not contemplate an absolute right to alienate one's share before partition.[2] The view that the interest was inalienable before partition was adhered to in Northern India.[3] and was followed by a consistent series of decisions in Northern India and Bengal (Mitākṣarā cases).[4]

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[1] See Vivāda-ratnākara (text no.410; p.499) on Kāty.848; tr. Jha, HLS, II, 46.

[2] See above, .

[3] Raja Bydianund v. Jydutt Jha, 4 S.D.A. 160. Sheo Surran Misser v. Sheo Sohai, (1826) 4 S.D.A.158 (1 Morley's Digest 42(25); Nundram v. Kashee Pande, (1833) 3 S.D.A.232 (1 Morley's Digest, 42(24).

[4] See Sadabart Prasad v. Foolbash Koer, (1869) 3 Beng.L.R. (F.B.) 31 and cases cited at Mayne, Hindu Law and Usage, 482.

The fact that there were repeated attempts in Northern India to introduce the alienability of one's interest which were foiled in decisions, in itself indicates that the strict Mitākṣarā rules were outgrown by the individual needs within the framework of the undivided family. In most parts of India it was finally achieved that a coparcener's interest could be seized in execution of a decree during the Coparcener's life-time the interest being ascertained and realised by a partition.[1]

Meanwhile in the South the law was developed further. The origins of this development may be assigned to the famous correspondence between Colebrooke and Sir Thomas Strange which introduced the notion that after all only an alienation beyond the share of the alienor might be invalid.[2] Colebrooke's cautious remarks were based on the peculiar theory prevalent in Bengal that though the alienation may interfere with religious concepts the transaction as such had an inherent legal validity.[3] In Viraswami Gramini v. Ayyaswami Gramini[4] it was finally held that the member of an undivided family may alienate the share of the family property to which, if a partition took place, he would be individually entitled. The decision followed earlier cases

[1] Deen Dyal v. Jugdeep Narain Singh, (1877) 4 I.A.247, I.L.R. 3 Cal. 198.

[2] See Strange, Hindu Law, I, 200f.; II, 343, 348.

[3] On the history of the introduction of the right, see Derrett, Supreme Court Journ. (J.), 20(1957) 85, 93ff.

[4] 1 Med. H.C.R. 471.

of the same High Court[1], which were in favour of a bona fide purchaser and e.g. upheld an alienation for value by a father and the oldest brother to the extent of their shares. In Viraswami Gramani's case a last attempt was made to support the alienability of the undivided interest with reference to the Mitākṣarā. It was explained that the widow's right to succession in preference to her husband's coparceners in the Dāyabhāga school rested on the unity of husband and wife and not upon the existence of a separate interest which the husband has during his lifetime according to Dāyabhāga law. Similarly in both schools-it was pointed out - the interest descended to sons and the right was not absolute so that a separate estate, as a matter of inference might be deduced in the Mitākṣarā school from the descent of the father's undivided share to sons. Here we may once more recollect that according to the Mitākṣarā a single coparcener was incompetent to alienate. The widow succeeds only if the husband died separate and not because of the oneness of husband and wife ipso facto. The fact that a partition between brother and brother's sons the latter take per stirpes refers to partition and until then the property and its accretions were an undifferentiated fund and none of the coparceners could say that he owned a definite share. There was no question of "descent" of a share before partition.

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[1] e.g. S.A. 33 of 1853, Mad. S.U. Decisions, 222.

The real reason which allowed the introduction of the new rule of the alienability of the undivided share before partition was - as formulated in Suraj Bunsi Koer v. Sheo Prasad[1] - "founded on the equity, which a purchaser for value has, to be allowed to stand in his vendor's shoes, and work out his rights by means of partition". An individual coparcener ought to fulfil his obligations which he was able to by enforcing a partition and should not permit to hide behind his coparcenary status and claim his action has been ultra vires.

Suraj Bunsi Koer's case acknowledged the development in Madras and Bombay by declaring it as settled law that one coparcener may dispose of ancestral undivided estate to the extent to his share and a fortiori that such share may be seized and sold in execution for his separate debt. The same law was stated to apply in Bombay.[2]

Subsequent decisions in South India, though conflicting and meandering, eventually worked out and ascertained the limits of the rights of alienation and the equities of the alienee without effectively destroying the framework of the law of the joint Hindu family. Firstly, a right of gift of the undivided interest was not admitted, as the very foundation of the alienor's equity is the payment of

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[1](1879) 6 I.A.88.

[2](1878-9) 6 I.A.88, 101f.

consideration.[1] Further the undivided share cannot be alienated by will because the right of survivorship was held to take precedence to the exclusion to that by devise. This was held in Lakshman Dada Naik v. Ramchandra Dada Naik[2] a decision which is an example for the restrictive attitude observed by the Privy Council which here supported a necessary development of the law without endangering the framework of the law of the joint family. Though it had been held in Madras[3] that an alienation by gift inter vivos would be valid against the non-assentient coparceners their Lordships refused to follow the proposition that a share should be alienable by will as a further consequence.

Their Lordships at the same time cast doubts on the Madras view that the interest in joint family property should be alienable by gift in view of the alienability being based on the purchaser's equity and the reasons for this cautiousness were laid down in the famous dicta: "The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine estqblished by modern jurisprudence".[4] In reaction to Lakshman Dada Naik's case the Madras High Court

[1] Peramanayakam Pillai v. Sivaraman, (1952) I M.L.J.308(F.B.).
[2] (1880) 7 I.A.181.
[3] Vitla Butten v. Yamenamma, 8 Mad. H.C.R.6.
[4] At p.195.

reverted to the doctrine that the right to alienate the undivided interest is based on the alienee's equity and thus not alienable by gift.[1]

The alienee as a purchaser of the entirety of the interest of a coparcener in the joint family property or as a purchaser of the interest of a coparcener in an item or even as a purchaser of the whole of a specific item is merely given an equity against the entire joint family estate and he may step into the shoes of his alienor in a suit for general partition. But this right is subject to the burden which the alienor as a member has to bear along with the other coparceners and subject to an allotment of the property purchased, if possible, without prejudice to the rights of the other members of the family.[2] The alienee does not become a tenant-in-common.[3] An alienation by the coparcener has not the effect of dividing the status of the family nor does the insolvency of a coparcener bring about a decision in the status of the family.[4] These decisions are eminently suited to a concept of the joint Hindu family as a modern legal institution. There may be occasions where

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[1] Baba v. Timma, (1833) I.L.R. 7 Mad.357, see remarks by Turner, C.J., at 365.

[2] Peramanayakam Pillai v. Sivaraman, (1952) I Mad.L.J. 308 (F.B.), 329, 318.

[3] Ibid.; see also Jagdish Pandey v. Rameshwar Chaubey, A.I.R. 1960 Pat.54.

[4] Peramanayakam Pillai v. Sivaraman, (1952) I Mad.L.J. 308 (F.B.), 329, 333 etc. See also Sheonandan v. Ugiah, A.I.R. 1960 Pat.60, Derrett, Introduction to Modern Hindu Law, para. 489.

an individual coparcener requires a loan and wants to use his coparcenary interest as a security without being forced to separate because his coparceners refuse to consent to the alienation. The consideration acquired by the coparcener becomes part of the common property and the alienor's act did not cause a total loss; moreover his appropriation by these means would be debited to him at a partition between the coparceners.[1]

Has then the introduction of the alienability of the undivided share seriously affected if not destroyed the legal basis of the joint Hindu family as is commonly alleged? We should remember that according to the Mitākṣarā school the coparceners were after all called owners (svāmis). With the means provided by the śāstra an initiative co-owner who was otherwise attached to joint family life would have been invariably forced to separate if he wanted to alienate his interest and the other coparceners refused their sanction. In other words the śāstra was not prepared for every modern eventuality and Courts furthered the adjustment of the joint Hindu family to modern needs without interfering necessarily the jointness of the coparceners.

We may ascribe the alienability of the share to an inherent right of the coparcener already countenanced in

[1] Derrett, Contribution to Ind. Soc., 6(1952) 17 at 41.

the śāstra and activated at Anglo-Hindu law. We may also accept the opinion of Panchapakesa Ayyar, J., on the alienability of the share, namely, that it is based on equity which though not recognised in the Mitākṣarā rests on equitable principles recognised by the śāstra in general. The śāstra recognises equity where a text of the śāstra would operate to bring about inequity.[1]

(2) Management. The Power of Alienation and the Rights of the Alienee.

(a) Rights and Duties of the Manager (Karta).

The adaptation of the śāstric concept of the father or eldest common ancestor or eldest brother being the family's natural representative and chief or predominant owner is marked by detailed rules; these rules define the rights and duties of the coparceners and family members as well as the legal position of the manager in relation to the coparceners and in relation to third parties. Where the śāstra was content to concentrate on the question what a father was allowed to alienate, Anglo-Hindu law eventually treated the question from the point of the powers of the manager, from the point of the rights of the family as a whole, and from the point of the rights of individual coparceners.

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[1] Peramanayakam Pillai v. Sivaraman, (1952) I Mad.L.J. 308, 386.

The core of the law relating to the management in Anglo-Hindu law was the text of Vyāsa and the comment of Vijñāneśvara in the Mitākṣarā.[1] The condition that the adult sons etc. had to consent to sustain an alienation by the father of ancestral property was initially adhered to even if the sale was beneficial to the family.[2] The rule continued to be in existence in Mysore and it was held there in 1953 that a debt incurred for defraying expenses at adoption of a son and for the purchase of bullocks as well as a subsequent mortgage of family property to raise money for the discharge of that debt are debts contracted for legal necessity. But there was nothing to show that the plaintiff had consented expressly or impliedly to the alienation and hence the alienation was not binding on him and he could recover his share.[3] But elsewhere, in British India, Courts took a different line. It might be very difficult to obtain the consent of all coparceners for an

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[1] Mit. I, i,28-9:..."while the sons and grandsons are minors and incppable of giving their consent to a gift and the like; or while brothers are son and continue unseparated, even one person who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it or the support of the family render it necessary or indispensable duties, such as the obsequies of the father or the like, make it unavoidable". For the text see above, .

[2] Muthoora v. Bootun, (1869) 13 W.R.30. See also Strange, Hindu Law, I, 20.

[3] Nanjunegowda v. Rangegowda, A.I.R. 1953 Mys.138; Hanuma v. Kencha Mariya, A.I.R. 1951 Mys.119.

alienation which was indispensable in the interest of the family. In the traditional system there were adequate means to persuade a recalcitrant coparcener apart from the unquestioning obedience towards the father or eldest brother. But the Courts were faced with possibility to recognise the consent of the sons as absolutely pre-requisite or to develop means to effect the speedy performance of transactions by the manager in the interest of the family as well as in the interest of bona fide alienees. The outcome was a shift towards mor objective criteria for the justification of alienations by the manager. A few decisions took the line that the necessity of the alienation as such was sufficient to warrant the alienation by the manager. The consent of the sons as postulated by Vijñāneśvara was not taken as the pre-requisite, but as the evidence of a valid sale.[1] The majority of decisions established that the manager has an implied authority; if family necessity exists that necessity rests upon the family as a whole and it is proper to imply a consent of all of them to the manager's action which necessity has demanded.[2]

The powers of a manager of a joint family in respect of alienations were considered by the Judicial Committee of

[1]Sir Colley Scotland, C.J., in Saravena Tewan v. Muthaji Ammal, 6 Mad. H.C.R.371 referred to in Ponnappa Pillai v. Pappuvayyangar, I.L.R. 4 Mad. 18.

[2]Sahu Ram v. Bhup Singh, (1917) 44 I.A., 126, 130: I.L.R. 39 All.437, 443.

the Privy Council in Hunooman Prasad v. Mst. Babooee[1] and though the case concerned the powers of a mother managing as guardian for an infant heir it formed the basis for the power of the manager to alienate joint family property for the necessity or benefit of the estate. The concept of "Legal necessity" and "benefit" was no doubt flexible and vague, but the consequence that these phrases were interpreted differently and that their import could change, was probably more suitable than the rigid requirement of the consent of all coparceners.

Hunooman Prasad's case[2] also provided protection for an alienee against non-alienating coparceners by introducing English equitable principles. The alienee was protected against the coparcener's suit if the alienation was for necessity or benefit of the estate or if he has given value and had made sufficient inquiry as to the existence of a cause justifying the alienation and had acted bona fide.[3]

(b) The Powers of the Father as Manager.

(i) Gifts of Affection. The Potentialities of the Śāstra in Modern Hindu Law.

The father has additional powers as manager. He may make "gifts of affection" to his daughters, sisters, and even sons out of moveable joint family property according

[1](1856) 6 Moo. I.A. 393.

[2](1856) 6 Moo. I.A. 393.

[3]Derrett, Introd. to Modern Hindu Law, paras. 441,93.

to the original Mitākṣarā position.[1] On the other hand certain śāstric texts provided that a woman may get for her maintenance a slice of immoveable property in excess of money or instead of money.[2] There were frequent attempts to introduce the possibility of making gifts of immoveable property - an anathema to strict Mitākṣarā law because land was reserved for the equal enjoyment of the male descendants. A strict attitude was taken in Jinnappa v. Chimmava[3] when it was held that even a small portion of the immoveable property of the family cannot be gifted by a Hindu father to his daughter for her maintenance, who had looked after him in his old age and for whom he had great love and affection. M.M. P.V.Kane who appeared in this case as Council tried to show that the gift was for maintenance though the full śāstric background was not shown by him so that the Court simply relied on the text of the Mitākṣarā which disallows gifts of affection of immoveable property. In Madras on the other hand custom allowed

[1] Mit. I,i,25. See Derrett, op.cit., para. 445.

[2] Kāty. 902. Derrett, JRAS, 1958, 17-25. See above, 109. Bṛhaspati (26,28) 200 and Parā. mā, 548. Vyāsa (see above, 109.) and Sm.ca.,653. This assignment of property is for maintenance purposes (see e.g. Sm.ca., 553:...jīvanārtham) thus gifts of affection as such, of immoveable property, are invalid unless they are for maintenance. Consequently the assignment of land by the father-manager to a daughter for maintenance may be subsumed under Mit.I,i,29 as an 'indispensable duty' and does not fall under Mit.I,i,25 where gifts of affection of immoveable property were disallowed.

[3] A.I.R. 1935 Bom.324.

gifts of a reasonable amount of immoveable property to a daughter even after marriage.[1] Other High Courts circumvented or ignored the Mitākṣarā rule.[2] The Supreme Court in Guramma v. Mallappa[3] have now decided that a father has power to make a valid gift of immoveable property which is binding on his posthumous and adopted son in favour of a daughter (~~or~~ their sister) by way of reasonable provision for her maintenance. The decision is supported with a passage of the Madana-ratnapradīpa as cited in the Vyavahāra-mayūkha which allows the gift of property up to 2000(paṇas) annually; if not given annually a larger sum may be given or even immoveable property, if the donor is able.[4] The gift by the father or his representative of a reasonable amount of the joint family property even of immoveables for the maintenance of daughters is a moral obligation according to the Supreme Court which may extend over years even after marriage. The moral obligation is the result of a right to a daughter or sister to a share in the family property at partition which was lost by the efflux of time. But it

[1] Kamala Devi v. Bachulal, A.I.R. 1957 S.C.434; Karuppa Gounder v. Palinammal, A.I.R. 1963 Mad. 245.

[2] See e.g. Tara Sahuani v. Raghunath Sahu, A.I.R.1963 Ori.50.

[3] A.I.R. 1964 S.C.510.

[4] See Derrett, "Gifts of Affection: The Supreme Court Revises the Mitakshara Law", A.I.R. 1965 Journ. 34 ff. Vyavahāra-mayūkha, 154: aneka-varṣeṣvitodhikam api śaktau sthāvaram api ca deyam ityapi sa [Madana] eva// Madana-ratnapradīpa, 326.

seems that mere gift of affection out of immoveable property where the daughter's maintenance is otherwise secured, would be still invalid.

The decision of the Supreme Court allows the inference that the Mitākṣarā and decisions expounding the Mitākṣarā may now be revised by the Supreme Court or supplemented with the use of material of the sastra which has not yet been admitted by the Courts as authoritative. This compels us to believe that the study of the śāstra has still practical purposes in order that decisions supported by the śāstric material may be technically correct.

(ii) The Pious Obligation.

Perhaps one of the most serious "inroads" in the law of the joint family was seen in the recognition of the legal liability of sons, sons' sons, and sons' sons' sons to pay to the extent of their interest in Mitākṣarā joint family property, the private, untainted (not illegal or immoral) pre-partition debts of their male ancestor. However the śāstric rules were considerably mitigated at Anglo-Hindu law. For some time in Bombay the strict śāstra rules were adhered to in so far as sons were held to be bound to pay the debt of the father with interest independent of assets inherited, whereas the grandson was held to be liable for debts though without interest.[1] But through legislation

[1] Narasimharao v. Antaji, (1865) 2 Bom.H.C.R.61.

the male issuers liability was limited to assets inherited.[1] In Madras a practice had developed that when no assets were inherited the son's obligation would be only moral and rests on the notion that the debt is a sin.[2] In fact it was tacitly assumed that the duty was not enforceable, and the coparcenary relation between father and son, with respect to ancestral property, was regarded as identical with the like relation between brothers with respect to their common property.[3]

The Privy Council however in Girdharee Lall v. Kantoo Lall[4] - a case from Mithila - held that the father can effect a sale of joint family property for his debt provided they were not immoral; and in the case of Muddun Thakur v. Kantoo Lal[5] it was decided that the joint estate can be sold in execution of a money decree of the father. Both cases establish that when a son sues to set aside the sale by his father the pious obligation relates to back to the time of the sale. The effect that the father is alive or dead was held to be irrelevant. The effect of the decisions was also to take away the powers to defraud purchasers which would have allowed the father to retain the purchase money

[1] Hindu Heirs' Relief Act of 1866, sec.4.

[2] See on the history of the pious obligation Muttusami Ayyar,J., in Ponnappa Pillai v. Pappuvayyangar, 1881 I.L.R. 4 Mad.1 at 15ff.

[3] Ponnappa Pillai's case, at 23.

[4] (1874) 1 I.A.321.

[5] (1874) 1 I.A. 333.

while the son could make use of his power to interdict an alienation without "need or benefit of the family" based on the Mitākṣarā.[1]

For Madras this development was accepted in a majority decision.[2] Innes, J., in a dissentient judgment held that purchaser of ancestral property under the decree takes at the most only the share or the interest to which the father was entitled at the date at which the charge was created. He thought that the obligation would devolve with the accruing share upon the surviving coparceners.[3] Muthusami Ayyar concurred with Innes, J., and held that the father's share is all that passes by the sale during his life when it is neither justified by necessity or benefit of the family. The same way as an alienee could have been defrauded by a coparcener alienating his undivided share and consequently an equity was created in favour of the alienee, the same way, he believed, the undivided share of the father should separate as a matter of inference. Moreover as the father's undivided share descends to his son and the right of survivorship is not absolute an equity would be created in favour of the alienee which would limit the son's power of interdiction to his own share.[4] Turner, C.J., took the

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[1] I,i,27-9.

[2] Ponnappa Pillay v. Pappuvayyangar, 1881 I.L.R. 4 Mad.1.

[3] At p.12.

[4] Ponnappa Pillai's case, I.L.R. 4 Mad.1, at 36f. This suggestion followed dicta of Sir Scotland, C.J., in Ayyasami Gramini v. Virasami Gramini, 1 Mad.H.C.R.471. See above,

view that the obligation was not merely moral.[1] There is absence of any severalty of ownership and the right of survivorship prevails over the claims of creditor and donees. There is nothing to show in the texts that the liability ceased to be commensurate with the whole estate ancestral or self-acquired.[2] The son's obligation is not purely personal but an obligation incidental to his interest as is clear from Girdharee's case. Being incidental to the heritage it must subsist from the inception of the son's interest.[3]

In Brij Narain v. Mangla Prasad[4] the principles were summarised and laid down in five rules.[5] In this decision the concept of "antecedency" was clearly formulated; this concept emerged in previous decisions in consequence of the acknowledgement of the liability of the male issue during the lifetime of the male ancestor for practically any private "untainted" debts and conflicts with the son's right to question alienations not for the benefit of the family according to the pure Mitākṣarā text.[6]

The "pious obligation" as understood by the Supreme Court is based on religious considerations: if a person's

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[1] At p.44.
[2] At p.49.
[3] At p.64.
[4] (1923) 2 I.A.129.
[5] See e.g. Derrett, Introd. to Modern Hindu Law, para.477.
[6] See on the problem Derrett, Hindu Law: Mitakshara: The Pious Obligation and the Doctrine of "Antecedency", Supr. Ct. Journ., 18(1955) 139-50.

debts are not paid and he dies in a state of indebtedness his soul may have to face evil consequences, and it is the duty of his sons to save him from such evil consequences. The basis of the doctrine is spiritual and the object is to confer spiritual benefit on the father. It is not intended in any sense for the benefit of the creditor.[1] Nevertheless the pious obligation has developed in practice into a special weapon to aid the transferee. In spite of the dicta on the spiritual nature of the pious obligation, the Supreme Court go further and support purchasers substantially by deciding that the sons who challenge the alienation have to prove not only that the antecedent debt was immoral but also that the purchaser had notice that it were so tainted. This means that the basis of the pious obligation, namely the payment of the untainted debt is disregarded. The mischief which was to be avoided, namely possible collusions between father and sons would be thus replaced by another mischief namely that deception may be practised on the alienee and/son cannot prove the alienee's notice of the taint.[2]

Whether the institution has, however, vitally affected the joint Hindu family as a legal and social institution may still be doubted. We must remember that the śastric

[1] Per Gajendragadkar, J., in Luhar v. Doshi, A.I.R. 1960 C.S.964, 966.

[2] See Derrett, Lucknow L.J., 10 (1964) 1 ff.; 1964 Kerala Times 21.

provisions evidenced a very rigorous attitude in respect of the liability of male descendants which goes beyond that what has been achieved in Anglo-Hindu law save that sons, in Anglo-Hindu law were held liable even during the life-time of the father. ~~There is no proof that liability of paying the partners debt after his death had less "disastrous" effects than in former times as that means of readjustment of debts have been less effective in pre-British times.~~ It seems unlikely that in the śāstric time families were more protected against wasteful alienations for personal purposes and mismanagement by an imprudent father.

(4) The Position of the Manager in Modern Hindu Law.

The position of a manager at Mitākṣarā law as laid down in judicial decisions was that of a kind of trustee though not all the duties of a trustee are imposed on him. In fact his position is sui generis and only comprehensible with reference to the whole law of the joint Hindu family as a property-earning and -enjoying unit. Detailed technical rules filled the gaps where the traditional law would only outline the rights and duties. During the śāstric period simpler modes of acquisition and hereditary occupations made it easier to place merely full reliance on the sense of responsibility of the managing eldest common male ancestor.

His eldest son was to inherit his position eventually and continue his duties towards the whole family without there being necessarily an abrupt discontinuation of the management by the death of the father. The fiduciary position of the manager is still retained in modern law though the types of duties have become much more variegated and complicated by e.g. requirements of Income-tax, Estate Duty, and the Hindu Succession Act, 1956, section 6, which assigns a separate interest to relatives in respect to the undivided share of a deceased coparcener and of which the manager has to keep accounts.[1] There are many new burdens created by modern possibilities in trade, commerce and industry.

(5) Women as Managers. Their Rights in Property.

The complexity of the powers, responsibilities and liabilities of a manager in Anglo-Hindu law and modern Hindu law is perhaps also one of the reasons for the hesitancy to permit women as managers of joint Hindu families. We have seen that in the śāstra there was nothing which would basically militate against women being "managers" in the absence of adult or capable males.[2] The majority of High Courts held that the right to become a manager depends

[1] See further on the responsibilities of the manager Derrett, Introduction..., paras. 426-428.

[2] See above, 220.

upon the fundamental fact that the person on whom the right devolves was a coparcener of the joint family. In this view the Hindu Women's Rights to Property Act, (10 of 1937) - an enactment which was motivated by the intention to emancipate women by giving them better rights in property - has not conferred a corresponding right to represent the other members of the family as a karta. The Act had in effect restated pre-Mitākṣarā rules by assigning to a widow, or a widow of a predeceased son or of a son of a predeceased son the interest that would have been taken by her husband at a partition.[1] In Radha Ammal v. Commr. of Income-tax[2] it was held that a partnership agreement entered with a stranger by a Hindu widow representing her minor sons as a karta of the family is not valid. The effect of the Hindu Women's Rights to Property Act, 1937, was merely to confer upon the widow an interest in the share of the husband and the estate created in that interest is the interest of a Hindu widow. She is also entitled to claim partition of the properties, but all these rights either individually or cumulatively do not have the effect of conferring upon the widow the status of a coparcener in the family. Nor do they clothe her with the right to become a karta. This case dissented

[1] Cp. Viśvarūpa on Yājñ. 2,119 [p.246]; see sec. 3(1)-(3) of the Act.

[2] A.I.R. 1950 Mad. 538.

from Comm. of Income Tax v. Laxmi[1] where it was held that a female member of a joint Hindu family can become the manager of the joint family particularly if she is the only member sui iuris left in the family. The main arguments were: The status of a coparcener is not a sine qua non of competency to become the manager of the joint Hindu family of which she is a member. The archaic views that a woman did not deserve independence have been shaken by modern requirements and the status of a Hindu woman has been materially changed by the Hindu Women's Rights to Property Act (10 of 1937). She gets a right by marriage in the joint family property.

It is possible that this view gains eventually further judicial recognition in so far as especially in the absence or because of the incapacity of adult coparceners a woman may become manager. There are no fundamental objections in the śāstra.

Meanwhile the rights of women in coparcenary property before partition as laid down in the Hindu Women's Rights to Property Act (10 of 1937) have been altered by the provisions of the Hindu Succession Act (30 of 1956). The interest in coparcenary property devolves on female relatives and relatives claiming through such relatives specified

[1] A.I.R. 1949 Nag. 128.

in class I of the Schedule to the Act. Amongst such relatives are now the daughter, widow, mother etc. who share the interest together with sons etc. The interest is ascertained at a notional partition, i.e. as if a partition had taken place immediately before his death.[1] The Hindu Succession Act also provided that the interest of the female in the coparcenary interest under sec. 6 would be absolute (sec. 14 I.) so that her interest would be separate from the joint family property. Until partition she would have a right to maintenance and at a partition 'by metes and bounds' a right to a share in appropriate cases.[2]

We may finally ask ourselves whether the Hindu Succession Act in effect undermined the Mitākṣarā joint family by allowing female relatives (and relatives claiming through such females) a share in the coparcenary interest of the deceased. At pure Mitākṣarā law jointness, sometimes effected by reunion, was a way of disposing property and excluding female heirs. The Hindu Women's Rights to Property Act, 1937, had in fact stifled this possibility by providing for a right of the widow etc. to the husband's interest in the coparcenary property as well as to his separate property.[3]

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[1] Expl. 1 to sec. 6 of the Hindu Succession Act, 1956.

[2] See Derrett, Introduction..., para. 526-32.

[3] Sec. 3(1) and (2).

But under the Hindu Succession Act, 1956, a coparcener has the possibility to dispose of his interest by will so that he is able to exclude the widow etc. from participating with a share in the joint family property.[1] The testator on the other hand cannot utilise his powers over his coparcenary interest indiscriminately. Even if he disposes of his interest in favour of a stranger the share will remain subject to the rights of dependants.[2]

IV. PARTITION.

Anglo-Hindu law introduced a clear distinction between the rights of undivided coparceners and the mutual rights of sharers after partition. The distinction between division of right and division of property[3] is however no new introduction and the Vyavahāra-mayūkha already had declared that one could effect a severance by merely declaring one's intention to separate.[4] The division of right does not amount to a division of the property by 'metes and bound'. Members of a joint family may, however, divide a portion of the property without affecting the status of the family and confining the unity of title only to the extent of property so divided. The severance of status may be brought about

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[1] S.6, proviso, and s.30.

[2] Hindu Adoption and Maintenance Act, 1956, s.21.

[3] Appovier v. Rama Subba Aiyyan (1866) 11 Moo. I.A. 75.

[4] Kane's ed., 94; tr. 86.

by agreement or by unilateral declaration of a coparcener to hold the property in severalty.

Whereas there are no doubts that a coparcener can effect a severance by an unequivocal declaration of intention, one may not agree with the latest decision of the Supreme Court according to which the intention must be made known to all other members affected by the severance.[1] Subba Rao, J., remarked: "...the knowledge of the members of the family of one of them to separate from them is a necessary condition for bringing about the member's severance from the joint family. It is implied in the expression "declaration" that it should be to the knowledge of the persons affected. An uncommunicated declaration is no better than a mere formation of an intention to separate. It becomes effective as a declaration only after its communication to each person affected thereby".

Formerly it had been held that a mere posting of the notice was sufficient to validate a will executed by the coparcener desirous of separating, the day after it was posted.[2] But this view was overruled by the Supreme Court in a decision which will cause considerable inconvenience

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[1] Raghavamma v. Chenchamma, A.I.R. 1964, S.C.136.

[2] Narayana Rao v. Purushotama Rao, I.L.R. (1938) Mad. 315. Indira v. Sivaprasada Rao, (1953) Madras 245; see also Katheesumma v. Beechu, (1950) Mad. 502. See Derrett, Introduction to Modern Hindu Law, para. 519.

in practice.[1] The reason why the notice to the manager who is after all the representative of the joint family, or communication to one of the coparceners who is in position to inform the manager should not effect severance, are not equalised by the inconvenience created by coparceners who are e.g. absconding in order not to receive news of a severance.

The rules of partition - of which we can bring no full greatment - reflect like in the śāstra the intention to work out the rights of the sharers and prevent recurring claims of relatives who are separate. The notion of partition functions to put an end to the rights of collaterals and prevents relatives living jointly but separate in estate to ignore the effects of partition and so to attempt to take by survivorship to what e.g. actually the widow would be entitled.[2]

V. MALABAR CUSTOMS.

Malabar matrilineal joint families called tarwads in the marumakkathayam system and kutumba in the aliyasantana system were originally characterised by the absence of partition by individual volition. That property was

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[1] Derrett, "Communication of Intention to Sever", 56 (1964) Bom. L.R., 137ff., at 143-5.

[2] Martand v. Radhabhai, A.I.R. 1931 Bom. 97.

indivisible and that partition takes place when the family became too numerous so that the land could not support them and separation had to take place, is not contemplated in the śāstra from the earliest times.

The property of the tarwad was held jointly though property (self-acquisition) of a tavazhi (i.e. sub-tarwad) which consists of descendants of a female through the female line, could be held separately from another tavazhi. If one tavazhi was extinguished due to death, the property accrues to the common fund of the tarwad. The tarwad has been described as a quasi-corporation acting through the manager.[1] The property of the tarwad may also be managed by the eldest female, though usually the eldest male was the manager (karnavan, in South-Kanara, in Aliyasantana law called yejaman).

No member of the tarwad could originally partition though a tavazhi could in effect separate from another tavazhi. But the right to partition arose eventually and was recognised by statues. The mode of partition is usually per capita[2] unlike in the Mitākṣarā system. Similarly as in Anglo-Hindu law the right to partition and the equity of the alienee led to the alienability of the share before

[1] Gopala v. Kalyani, 1964 Ker. L. Times.

[2] See further Derrett, Introduction ... para. 585.

partition. But in Antherman v. Kannan[1] the adoption of Mitākṣarā law as practised in British-Indian Courts into Marumakkathayam law was refused.[2]

VI. CONCLUDING REMARKS.

The introduction of the possibility to alienate one's share in the undivided family property, the pious obligation as understood at Anglo-Hindu law, the rights of females in joint family property according to s.6 of the Hindu Succession Act, 1956, may in fact appear suited to support the extinction of the joint family as a legal and social institution, if we consider the effects cumulatively. On the other hand these devices have not affected the basic pattern between father and son and their responsibility for the family as a whole. The institution from the legal point of view is based today rather on continuation of jointness by agreement and has become rather a privilege than an institution founded on status as the traditional joint family. But this does not warrant the conclusion that the law has destroyed the social institution.

On the contrary judicial decisions - in spite of drawbacks and inconvenience which may be eventually rectified by the Supreme Court - appear to have contributed to the

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[1] A.I.R. 1961 Ker. 130 (F.B.)

[2] See Derrett, ubi cit., para. 580.

transition of the joint family from tradition to the modern demands so that it can still play a significant role in modern life.

The history of the joint Hindu family at Anglo-Hindu law and the experience gained by legislative measures may serve as an instructive precedent for other countries, for example Nigeria,[1] where joint families are about to emerge from their traditional background.

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[1] See Derrett (ed.), Studies in the Laws of Succession in Nigeria, Introductory Chapter.

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