EFFECT AND IMPLICATIONS OF AMENDMENT TO SECTION 6 OF HINDU SUCCESSION ACT

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INTRODUCTION

The 2005 amendment to section 6 of the Hindu Succession Act, 1956 has sharply overturned the traditional notion of a coparcenary by bringing within its fold daughters as well.[1] It has raised a lot of difficult questions. It is now uncertain how this transition would impact concepts like reunion which were hitherto governed by traditional Hindu law. The new provision itself is ambiguously worded and is open to anomalous interpretations. This project attempts to highlight these ambiguities and anomalies. It also looks at the possible ways in which they may be resolved in future.

The struggle over the property rights of women has been a protracted one, and the accomplishments have been few and far between. Also, till the advent of the Hindu Succession Act, 1956 [hereinafter HSA], most of the reforms were directed towards protecting the rights of wives. The introduction of the concept of notional partition in section 6 of the HSA, with the daughter as a class I heir, was probably one of the first steps in the statutory recognition of a daughter's right in her father's property.

Prior to the aforementioned enactment, the Hindu Law Committee had recommended the abolition of the concept of right by birth, but the suggestion had been met with stiff opposition from the patriarchal forces in society which were unwilling to concede the possibility of granting equal rights to a daughter. The idea of making daughters coparceners was likewise rejected. It has taken the Parliament nearly fifty years to grant a right by birth to daughters, and then also the attempt has been half-hearted, as is evident from the number of anomalies it has

[1] The Hindu Succession (Amendment) Act, 2005.

produced.

The need to introduce daughters as coparceners probably arose out of the inadequate protection afforded to them under the old section 6. While the HSA had enabled daughters to get a share on notional partition, at the same time it had also authorized the coparceners to will away their undivided interest in the coparcenary - a practice alien to traditional Hindu law. Hence, there was a substantial chance of the daughter's interests being defeated. Under the amended provision, the daughter acquires an interest by birth, and continues to be protected even when the father disposes of his own interest through a will.

This project endeavours to examine the various dimensions of this deconstruction of the gendered nature of coparcenary rights. Part II situates the property rights of women in a historical context. It traces the evolution of the gendered notion of right by birth, and its metamorphosis into a gender neutral principle with the introduction of daughters as coparceners. Part II looks at the initiative taken by certain State Legislatures in granting coparcenary rights to daughters, and the deficiencies manifest therein. Part III studies the impact of similar changes brought about by the Parliament through the amendment of section 6 of the HSA, with special emphasis on the repercussions of such a transformation on concepts like pious obligation, female intestate succession reunion et al. The criticisms levelled against this provision form the subject matter of Part IV while the viability of such a measure vis-d-vis other alternatives, like the abolition of the joint family system has been discussed in Part V. The project concludes with some suggestions for amending the HSA so as to take care of the anomalies.

TRANSFORMATION OF THE TRADITIONAL NOTIONAL OF A COPARCENARY

A Mitakshara coparcenary, according to the traditional principles of Hindu law, is a narrower institution within a joint family, comprising exclusively of male members, and these members are considered to be the "owners" of the joint family property.[2] The membership is limited to

[2] J.D.M. DERRETT, INTRODUCTIONS TO MODERN HINDU LAW 248 (1963) [hereinafter DERRETT].

three generations next to the holder in unbroken male descent.[3] The coparceners acquire an interest in the coparcenary by birth (or by valid adoption).[4]

The Evolution of the Concept of Right by Birth

The concept of right by birth in the property of the father is not a product of Vedic times, but a subsequent development, resulting from the importance that came to be attached to landed property.[5] In the beginning there was plenty of surplus land. A son could easily move out of his family and settle down on another piece of land. Consequently, there was no need to give him any interest in his father's land. As this surplus started dwindling, the sons chose to remain on the family land and would not separate easily. This led to the development of the joint family as well as the concept of right by birth.[6]

N.C. Sen Gupta has traced the evolution of this concept in four stages based on classical texts. In the first stage, the sons had no right over the family property as long as the father was alive.[7] The second stage placed a moral or religious limitation on the powers of alienation of the father, on the ground of maintenance of family members.[8] The third stage marked the end of the absolute rights of the father over immovable property.[9] The final stage brought about co-ownership of father and son in the property.[10] This is how the principle of right by birth got crystallized.

The denial of this right to women, however, has its basis in religious practices. Women lacked

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[3] D.F. MULLA, PRINCIPLES OF HINDU LAW 315 (2000) [hereinafter MULLA].

[4] DERRETT, *supra* note 2, at 249.

[5] K. Nagendra, The Concept of Right by Birth and its Changing Dimensions in the Hindu Joint Family Law 8 (2000) (Unpublished Master of Laws dissertation, National Law School of India University) [hereinafter Nagendra].

[6] N.C. SEN GUPTA, EVOLUTION OF LAW 141-144 (1962).

[7] For instance, according to the Manusmriti, "Upon the demise of the father and the mother, the brothers should come together and divide the paternal wealth, but they have no property in it while they live." *See* Nagendra, *supra* note 5, at ii.

[8] This is clear from the text of Vyasa- "Immovables and slaves even if they have been acquired by himself cannot be sold without bringing together all the sons. Those who are born, those who are unborn and those who are in the womb, all look for maintenance; there is no gift or sale permitted." See Nagendra, *supra* note 5, at 13.

[9] For instance, according to Prakasha, "In the case of immovable property....even though self-acquired, there shall be no giving or selling without the consent of all the sons." See Nagendra, *supra* note 5, at 14.

[10] For example, Katyayana says that "grandfather's property shall belong equally to the father and son." See Nagendra, *supra* note 5, at 15.

the fitness to partake in sacrificial rituals on an equal basis with men. The actual offering on their behalf was made by a male.[11] Further, they lacked the *indriya* or the vital potency which was considered essential for dealings with Indra and other *devas*.[12] Consequently, it was asserted in a later Vedic text that they were non-sharers. This was interpreted to mean that they could neither inherit nor take property on partition of the family wealth.[13] In contrast to this, the right of a male coparcener was based on his ability to offer the funeral cake to the common ancestor.[14] It was only a son, a grandson or a great-grandson who could offer spiritual salvation by the performance of funeral rites.

The Subsequent Undermining of the Concept

In an attempt to improve the property rights of women, the legislature ended up undermining the classical institution of coparcenary. For instance, the Hindu Women's Right to Property Act, 1937 allowed a widow to step into the shoes of her husband in respect of his undivided share in the coparcenary, and hence the operation of survivorship was postponed till her death. Moreover, though the widow was not a coparcener, she hitherto became entitled to certain rights previously available only to coparceners, like the right to demand a partition.[15]

The institution came close to extinction under the Hindu Code Bill wherein the B.N. Rau Committee had proposed the abolition of the Mitakshara coparcenary and with it the concepts of survivorship and right by birth. However, due to the furore that this proposal generated it was not incorporated in the HSA.[16] The Mitakshara coparcenary was retained though under section 6 and section 8 changes were effected in it. Survivorship was no longer the general rule. Where the deceased left behind female class I heirs, or male heirs claiming through female class I heirs, or where the deceased had disposed of his undivided interest through a will, the

[11] J.D.M. Derrett, *The Development of the Concept of Property in India*, in II Essays in CLASSICAL AND MODERN HINDU LAW, 23 (1977) [hereinafter CLASSICAL AND MODERN HINDU LAW].
[12] *Id*.
[13] CLASSICAL AND MODERN HINDU LAW, *supra* note 11.
[14] J.D. MAYNE, TREATISE ON HINDU LAW AND USAGE 552 (1993) [hereinafter MAYNE].
[15] MAYNE, *id*. at 861.
[16] M. Kishwar, *Codified Hindu Law: Myth or Reality*, 33 EPW 2145, 2154 (1994) [hereinafter Kishwar].

doctrine of survivorship was inapplicable.[17] Thus the concept of a son's right by birth in the father's share was diluted.

Transformation

The classical notion of coparcenary underwent a radical change with the inclusion of daughters as coparceners, first in certain States,[18] and then at a national level.[19] Thus, the religious and spiritual basis of a coparcenary that admitted only males was undermined and subsequently transformed by the legislature.

DAUGHTERS AS COPARCENERS

While the ancient law drafters had given coparcenary rights to only males, they had safeguarded the position of women by way of stridhana.[20] With time this concept degenerated into dowry and the daughter lost control over the property, which was now presumably given on her behalf, and for her happiness, to the husband and his relatives.[21] Consequently, the exclusion of daughters from the coparcenary property became a source of acute hardship and discrimination.

The idea of including daughters as coparceners was mooted as early as in 1945 in statements submitted by several individuals as well as groups to the Hindu Law Committee, and just prior to the enactment of the HSA it was even debated upon in the legislature.[22] But it was much later that this idea came to be actualized in four Indian States, with Andhra Pradesh taking the lead, and daughters were made coparceners through amendments made to the HSA.[23]

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[17] See §§ 6, 8 and 30 of the HSA.

[18] These States were Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka.

[19] *See* the Hindu Succession (Amendment) Act, 2005.

[20] Stirdhana refers to that property which is acquired or owned by a woman and over which she has absolute control, subject to a few exceptions. See MAYNE, supra *note* 14, at 874.

[21] *See* F. AGNES, LAW AND GENDER EQUALITY 82 (1999).

[22] Kishwar, *supra* note 16, at 2155.

[23] 29A, 29B and 29C of the Hindu Succession (Andhra Pradesh Amendment) Act, 1985, the Hindu Succession (Tamil Nadu Amendment) Act, 1989, and the Hindu Succession (Maharashtra Amendment) Act, 1994. See also, §§ 6A, 6B and 6C.

The avowed purpose of these State Amendment Acts, as evident from their preamble, was twofold[24]- First, to realize the constitutional mandate of equality before law enshrined *inter alia* in Articles 14 and 15.[25] The exclusion of the daughter from participation in coparcenary ownership, merely by reason of her sex, was found to be contrary to it. It may be noted that this was a highly progressive step given the fact that certain High Courts had held the exclusion to be not violative of Article 15.[26] Second, the provision was intended to eradicate the practice of dowry which was believed to have stemmed from this exclusion.

Defining Features of the State Amendment Acts

The most important aspect was the conferment of a right by birth in coparcenary property on daughters remaining unmarried on the date of the commencement of the respective amending Acts. Such daughters were thereafter made subject to the same rights and liabilities as a son. They were to be treated as coparceners from the date of their birth. Accordingly, courts held that a daughter could challenge any alienation or gift made during the period between her birth and the commencement of the Act.[27]

This conferment of the right by birth on daughters was, however, subject to the qualification that no partition should have been effected prior to the commencement of the Act. A "partition" for the purposes of this provision had to be a partition by metes and bounds.[28] Where in a

[24] See, for instance, the Preamble of the Andhra Pradesh Amendment Act.

[25] At this juncture it may be noted that the bulk of judicial authorities do not consider personal laws as "law" for the purposes of Article 13 of the Constitution. As such these laws are not subject to Part III of the Constitution of India. See M.P. JAIN, INDIAN CONSTITUTIONAL LAW 845-847 (2003) [hereinafter JAIN]. Per Contra, see C. Masilamani Madaliar & Ors v. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli, (1996) 8 S.C.C. 525, where the Supreme Court held that personal laws inconsistent with fundamental rights would become void under Article 13. See B. Sivaramayya, *Coparcenary Rights to Daughters: Constitutional and Interpretational Issues*, (1997) 3 S.C.C. (J.) 25, for further arguments in support of the latter view. Notwithstanding the ambiguity on this point, under the Concurrent List, the legislatures have the power to bring personal laws into conformity with fundamental rights [hereinafter Sivaramayya]

[26] See for instance, Nalini Rajan v. State, A.I.R. 1977 Pat. 171 where the Patna High Court held that "although a daughter can be a member of the Hindu Undivided Family she cannot be given the status of a caparcener in a coparcenary, even after the commencement of the Constitution of India, and that by itself cannot be said to attract the constitutional inhibitions contained in Article 15.

[27] M. Shanmugha Udayar v. Sivanandam, A.I.R. 1994 Mad. 123.

[28] *See* Dodla Chinnabbai Reddy v. Dodla Kumara Swami Reddy, 2002 (6) A.L.D. 415; M. Shanmugha Udayar v. Sivanandam, A.I.R. 1994 Mad. 123.

partition suit, only a preliminary decree has been passed, and not a final one, the amendment would have the effect of varying the shares of the parties in the preliminary decree.[29]

Another notable feature of the State Amendment Acts was the retention of the concept of survivorship. It was to operate when the daughter died intestate leaving behind neither any child, nor any child of a pre-deceased child. If she died intestate leaving behind such an heir, notional partition was to apply in order to determine the shares. Accordingly, the share that would have been allocable to her on partition, was to be allotted to her surviving child along with her husband, and in the absence of a surviving child, it had to be allotted to the child of such pre-deceased child.

Further, when the interest of the intestate daughter devolved upon two or more heirs, and any one of such heirs proposed to transfer his or her interest in the property, the other heirs were given a preferential right to acquire the interest proposed to be transferred.

An Analysis of State Amendment Acts

First, the State Amendments make a distinction between daughters who married prior to the date of commencement of the Act and those who had remained unmarried. The implicit reason appears to be that a married daughter would probably have got dowry at the time of her marriage.[30] However, this is a rebuttable contention. The dowry may or may not have been given.[31] Also, dowry is a onetime settlement that generally consists of expendable or movable property. Most of it is spent on extravagant display which supposedly enhances the status of the family.[32] Its value cannot be compared with that of immovable property.[33] Further, it has been pointed out that weddings of both sons and daughters are conducted on an equally lavish scale, and that even boys receive gifts which may be equivalent in value to those received by

[29] S. Sai Reddy v. S. Narayana Reddy, (1991) 3 S.C.C. 647.
[30] Sivaramayya, *supra* note 25, at 33.
[31] B. Agarwal, *Far From Gender Equality*, 20 (2) LAWYER'S COLLECTIVE 16, 17 (2005) [hereinafter Agarwal].
[32] *See* M. Kishwar et al., *Inheritance Rights for Women: A Response to Some Commonly Expressed Fears*, 57 MANUSHI 2 (1990).
[33] Agarwal, *supra* note 31.

girls. Furthermore, sometimes even daughters-in law get gifts.[34] Thus there is no rational basis for the exclusion of married women.

Second, by virtue of being a coparcener, a daughter may also become a karta. The capacity of women to act as de facto managers of joint family property, in certain contingencies, had been recognized in the Dharmasastras[35] well as by the courts.[36] These amendments confer de jure recognition on the ability of a woman to act as karta.

Third, under traditional Hindu law, a religious or spiritual duty was cast on sons to discharge the debts of the father so as to save his soul.[37] Over time this pious obligation got converted into a strict legal obligation and the son was made liable to the extent of his undivided interest in the coparcenary.[38] Now that daughters have an equal interest in the coparcenary property and, as per the Act, are to be subject to the same liabilities as sons, it appears that they should be equally liable. But whether this liability of discharging the father's debt can be deemed to be a pious obligation is uncertain given the religious connotations attached to the doctrine.[39]

Fourth, the retention of the principle of survivorship, in the absence of a child, or a child of a pre-deceased child, ensures that the coparcenary property acquired from the natal family does not go to the husband or his heirs. However there is an anomaly in the wording of the provision[40] which can be interpreted to mean that where the intestate female coparcener is survived by a child, or a child of a pre-deceased child, the provisions of section 15 of the HSA would apply. Accordingly, the husband would then share equally with the children or the children of the pre-deceased children.

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[34] See, the comments made by Shrimati D. Purandeswari in the Lok Sabha, Fourteenth Lok Sabha Debates, available at http://loksabha.nic.in (last visited February 08, 2015).

[35] J.D.M. Derrett, May a Hindu Woman be the Manager of a Joint Family at Mitakshara Law?, IV ESSAYS IN CLASSICAL AND MODERN HINDU LAW, 128 (1977).

[36] For instance, see Hunoomanpersand Panday v. Mussumat Babooee Munraj Koonweree, 6 M.I.A. 393.

[37] DERRETT, *supra* note 2, at 311.

[38] Mulla, *supra* note 3, at 443.

[39] *See* Sivaramayya, *supra* note 25, at 35.

[40] § 29B, introduced by the AP Amendment Act, reads: "Where a female Hindu dies... having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship. Provided that if the deceased had left any child or child of a pre-deceased child, the interest of the deceased shall devolve by testamentary or intestate succession as the case may be, under this Act, and not by survivorship." Identical provisions are present in the other three State Amendment Acts as well.

Fifth, following from the above criticism, if the interest has devolved as per the provisions of section 15 of the HSA, and subsequently one of the heirs, say thechild or the child of a pre-deceased child, wishes to transfer his or her share, the husband along with the other heirs, would have a preferential right to acquire it. The purpose behind giving preferential rights is to prevent fragmentation of the estate and to avoid entry of strangers into the family business. This purpose may be defeated if the husband is given preferential rights.[41]

The Changes Introduced by the Amendment of 2005

In May 2000, the Law Commission of India recommended the amendment of the HSA along the lines of the State Amendment Acts. However, while the State Amendments had been silent as to the pious obligation of a daughter, the Commission proposed abolition of the concept of pious obligation itself.[42] The most significant recommendation was the retention of the classification between married and unmarried daughters, on the ground that even though the gifts received by the daughter at the time of marriage may not be commensurate with the son's share, they are often quite substantial.[43] Fortunately, the Parliament chose to eliminate this distinction. Accordingly, a daughter married prior to the Central Amendment is as entitled to a right by birth in the coparcenary as an unmarried daughter.

Further, the Bill drafted by the Commission proposed that on the death of a Mitakshara coparcener, his interest should devolve by testamentary or intestate succession, as the case may be, under the HSA, and not by survivorship.[44] Thus, unlike the State Amendments, under the Central Amendment, in every case where a female coparcener dies intestate, section 15(1) of the HSA would be attracted. Under the said section, devolution is more favourable to the heirs of the husband, sometimes even when the property that is devolving was acquired from the natal family.

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[41] *See* Nagendra, supra note 5, at 100.

[42] LAW COMMISSION OF INDIA, 174TH REPORT ON PROPERTY RIGHTS OF WOMEN: PROPOSED REFORMS UNDER THE HINDU LAW (2000), available at http://awcommissionofindia.nic.in/reports.htm (last visited February 08, 2015) [hereinafter 174TH LAW COMMISSION].

[43] *Id*.

[44] 174TH LAW COMMISSION, *supra* note 42.

Status of the State Amendments after the Central Amendment

Both the Central Act and the State Amendment Acts were enacted under Entry 5, of the Concurrent List of Schedule VII. According to the rule of occupied field, when two statutes pertain to the same subject matter, but when Parliament intends to make its enactment a complete code and evinces an intention to cover the entire field, the State law whether passed before or after would be overborne on the ground of repugnancy.[45] This is so even where obedience to each of them is possible without disobeying the other.[46] Thus the Central Amendment can be said to have superseded the State Amendments, and the amended section 6 of the HAS represents the current legal position with regard to the coparcenary rights of daughters.

COROLLARY OF MAKING DAUGHTERS COPARCENERS UNDER THE AMENDED SECTION 6

Whether the Daughter's Children are Coparceners Along With Her

A literal interpretation of section 6 would entitle the children of female coparceners to claim a right by birth in their mother's interest in the coparcenary.[47] This is due to the fact that the section deems the daughter a coparcener, and a son of a coparcener has a right by birth in the coparcenary property, provided he is not separated by more than four degrees from the common ancestor. Further, section 6(1) provides that any reference to a coparcener would be deemed to include a reference to a daughter of a coparcener. Thus the daughter of a female coparcener would also be deemed to be a coparcener.

Alternatively, according to this author, it may be argued that section 6 does not confer a right by birth on the children of a female coparcener. A right by birth exists primarily in the context

[45] State of Orissa v. M.A. Tulloch &Co., A.I.R. 1964 S.C. 1284. See further, JAIN, supra *note* 25, at 546-548.
[46] JAIN, supra *note* 25, at 546-548.
[47] *See* P.P. SAXENA, 11 FAMILY LAW LECTURES, 137 (2004). She feels that the children of a daughter would also be coparceners, and thereby also members of the mother's natal family. This remark was made in the context of the State Amendment Acts which are substantially similar to the present S. 6 and the author feels that this position can be applied to the latter provision as well

of ancestral property and that which has been blended with it.[48] Ancestral property is property inherited by a Hindu from his father, father's father, or father's father's father.[49] Section 6 merely enables a daughter to stake a birth right in such ancestral property. In the hands of the 0daughter the property would not be ancestral property as against her children,[50] and hence they do not have a right by birth in it. Before partition she would hold it as joint tenants with the other coparceners and on partition it would become her separate property.

Further, a combined reading of the Statement of Objects and Reasons, the Law Commission Report on the point, as well as the Parliamentary debates, shows that the mischief sought to be redressed was the discriminatory practice of allowing only males to claim a birth right in the coparcenary property. Thus it is primarily the daughter whose interest was being protected and not her children. Their interests would be already protected in their father's family.

According to the well-established rules of statutory interpretation, where more than one interpretation is possible, effect must be given to that interpretation which suppresses the mischief and advances the remedy.[51] This rule is known as 'purposive construction' or 'mischief rule.[52] Applying this rule to the instant case it may be argued that the scope of S. 6 should be confined to making daughters coparceners, and not their children.

Finally, it is submitted that this interpretation would also avoid the strange situation where the children of a female coparcener become coparceners in two families simultaneously, and maybe even become kartas of two families at the same time. Even though it is possible to thus interpret the section, yet it would be advisable to specifically amend it.

Daughters as Kartas

The powers of a karta are founded on his being an "owner" of coparcenary property, as he binds himself by all proper acts which bind his coparceners.[53] Thus under traditional Hindu

[48] MULLA, *supra* note 3, at 324.
[49] MULLA, *supra* note 3, at 315.
[50] MULLA, *supra* note 3, at 328. A maternal grandfather would not be an ancestor.
[51] See generally, G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 114-120 (2004) [hereinafter SINGH].
[52] This rule was laid down in Heydon's case, 76 E.R. 637. According to it, one needs to consider the following questions: (i) what was the law before the making of the Act, (ii) what was the mischief or defect for which the law did not provide, (iii) what is the remedy that the Act has provided and (iv) what is the reason of the remedy.
[53] DERRETT, *supra* note 2, at 260.

law only a coparcener could become a karta and[54] this view was subsequently endorsed by the Supreme Court. In this case the Apex Court did not allow women to act as kartas solely on the ground that they lacked the status of coparceners. Now that daughters have been granted this status and are entitled to enjoy the same rights as a male coparcener as per the amended S. 6(1), this disqualification no longer exists. Hence daughters should be able to become kartas. Yet it has been noted that there is a general reluctance to make them kartas.[55]

This is usually justified on the grounds of practical difficulties as a daughter, on marriage, moves to her matrimonial hone. However, it has been contended that this argument is hardly ever used when the son decides to settle elsewhere.[56] Aspersions are also cast on her ability to manage the property.[57] But if mothers have been allowed to act as defacto managers of joint family property in the past, there is no reason why there should be any reluctance to make a daughter a karta.[58] If the daughter is incompetent, as in the case of an incompetent male karta,[59] here also the other coparceners can demand a partition.

Devolution of the Share of an Intestate Female Coparcener

Since the new amendment has abolished the concept of survivorship altogether, on the death of any coparcener the rules regarding testate or intestate succession, under the Act, are attracted.[60] The scheme of intestate succession to females under section 15 of the HSA tends to favour the heirs of the husband over her blood relations.[61] Further, the husband is clubbed along with the children in the first category. Thus in every case where a female coparcener dies intestate, the husband would inherit equally with the children. This provision seems patently unfair.

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[54] Commissioner of Income Tax v. Govindram Sugar Mills, A.I.R. 1966 S.C. 24.
[55] 174TH LAW COMMISSION, *supra* note 42.
[56] Agarwal, *supra* note 31.
[57] 174TH LAW COMMISSION, *supra* note 42.
[58] Sivaramayya, *supra* note 25, at 33.
[59] MULLA, *supra* note 3, at 378.
[60] It may be noted that S. 6(2) of the HSA categorically empowers a female coparcener to dispose of her share in the coparcenary by testamentary disposition. Since this provision contains a non obstante clause it would override the explanation to § 3o wherein only a male Hindu in a Mitakshara coparcenary could will away his interest.
[61] See § 15(1) of the HSA where the parents are placed after the heirs of the husband.

The provisions of section 15(2) show that the legislature had considered the source from which a female inherited the property important for the purpose of devolution of that property. The object of this provision was to ensure that the properties did not pass into the hands of those to whom justice would demand they should not pass.[62] This principle should logically apply in the case of devolution of the interest of a female coparcener in her natal family. However, section 15(2)(a) applies only to property 'inherited' from the father and cannot be extended to a share acquired by right, on birth. The disapproval against devolution of father's property on the husband or his heirs was so strong that the latter are not just denied a preferential status, but are altogether excluded from the purview of section 15(2)(a).

It must be remembered that section 15 was framed at a time when daughters did not enjoy coparcenary rights. It has been held that in interpreting an Act of Parliament "it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by the Parliament to be existing at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."[63] But when a fresh set of facts having a bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention.[64] Accordingly, now 'handwriting' includes typewriting, 'telegraph lines' include 'electric lines' et al.[65] Analogously, it may be argued that 'inherited' in section 15(2)(a) can be expanded to include the case of a daughter's interest in the coparcenary. However, this is not a very strong argument.[66] There is a need to specifically amend section 15(2)(a) so that the object manifest in it is protected.

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[62] REPORT OF THE JOINT COMMITTEE ON THE HINDU SUCCESSION BILL (1954), cited from S.A. KADER, THE HINDU SUCCESSION ACT, 1956 (2004).

[63] Per Wilberforce, J. in Royal College of Nursing of the U.K. v. Dept. of Health and Social Security, [1981] 1All E.R. 545.

[64] *Id*.

[65] *See* Senior Electric Inspector v. Laxrnnarayan Chopra, A.LR. 1962 S.C. 159; State v. S.J. Choudhary, A.I.R. 1996 S.C. 1491 respectively.

[66] This argument can be countered on the ground that at the time of introducing the amended § 6 the biased order of devolution was discussed by at least two members in the Lok Sabha, and had the legislature wanted it could have amended § 15. However, the discussion was in the context of the general preference that is given to the husband and his heirs over the blood relations. The specific consequences arising out of making daughters coparceners were not debated. See, the comments made by Prof. M. Ramadass and Smt. C.S. Sujatha in the Lok Sabha, Fourteenth Lok Sabha Debates, *supra* note 34

Preferential Rights to the Husband

Following from the above argument that in every case, the husband would inherit along with the children or the children of pre-deceased children, under section 22 of the HSA he would also get a preferential right to acquire the shares of the co-heirs. This is again quite unfair.

Blending

The theory of blending under Hindu law involves a process of wider sharing of one's own properties by allowing the other members of the family the privilege of common ownership and common enjoyment of such property, without renouncing one's own interest in favour of others.[67] This implied that only a coparcener could blend his property. A female was not permitted to do so.[68] However, the introduction of daughters as coparceners would now enable them to blend their property. All other categories of females, like a wife, would be still barred from doing so.

Possibility of Reunion

The cardinal rule in the case of reunions is that only parties to the original partition can reunite. Now that daughters have been made coparceners and can become parties to a partition, can they also reunite? It is to be noted that the subject of reunion falls outside the purview of the HSA and hence would be governed by uncodified Hindu law.[69] According to the Mitakshara School, once a (male) coparcener has separated, he can reunite only with his father, brother or paternal uncle, but not with other relations, even though they were party to the original partition.[70] From this it cannot be conclusively said whether a reunion between a father and daughter, brother and sister, or niece and uncle is possible. Since a daughter has been made a coparcener now, she should be able to reunite. On the other hand, reunion had traditionally implied a reunion between brothers, or father and son, or nephew and paternal uncle. It is submitted that the former view is more in consonance with the spirit of the amended section 6.

[67] Pushpa Devi v. Commissioner of Income Tax, New Delhi, A.I.R. 1977 S.C. 2230.
[68] *Id.*
[69] Sivaramayya, *supra* note 25, at 36.
[70] MULLA, *supra* note 3, at 545.

CRITICISMS AGAINST THE AMENDED SECTION

First, if a partial partition with respect to some coparceners had been effected before the commencement of the new provision, their share would remain intact. On the other hand, those who remained undivided would suffer a reduction of share with the entry of the daughter in the coparcenary.[71] This is a valid criticism but it seems unavoidable.

Second, it has been repeatedly argued that where wives do not get a share on partition, if daughters are made coparceners, the shares of the former would further diminish.[72] This is because with the introduction of the daughter as a coparcener, the father's share, and therefore the quantum available for the purposes of notional partition, reduces. Thus the impact of the amendment on wives can be understood with reference to two classes of wives.[73]

> i) Those who belong to States like Maharashtra, where wives are given a share on partition. Here the share of the widow will decrease but it will now become equal to that of a son or a daughter.
>
> (ii) Those who belong to States like Andhra Pradesh, where wives do not receive a share on partition. Here the widow gets a share only on notional partition, and after the amendment, this share would be smaller. Thus, it is argued that while the amendment will reduce the inequality between sons and daughters, it would bring about inequality between a daughter and a widow.

Similarly, the share of the deceased's mother would also depend on the State to which she belongs. Other female Class I heirs will also get a diminished portion.[74] It has been contended

[71] Sivaramayya, *supra* note 25, at 30.

[72] *See* I. Jaising, *An Uncertain Inheritance: A Critique of the Hindu Succession (Amendment) Bill*, 20 (2) LAWYER'S COLLECTIVE 8 (2005) [hereinafter Jaising]; B. Sivaramayya, The Hindu Succession (Andhra Pradesh Amendment) Act 1985: A Move in the Wrong Direction, 30 (2) JOURNAL OF THE INDIAN LAW INSTITUTE 166 (1988); Agarwal, supra note 31; Sivaramayya, supra note 25.

[73] *Id*.

[74] Agarwal, *supra* note 31.

that justice cannot be secured for one category of women at the expense of another.[75] Further, the goal of uniformity in law is impaired.[76]

However, according to the author, this is not a very valid criticism. The wives would also be entitled to an interest in their respective fathers' shares. So, even though their share on notional partition would decrease, yet at the same time they would get property from another source altogether. Further, the endeavour at this juncture is to remove discrimination between sons and daughters. In the long run all women will benefit.

Third, with daughters becoming coparceners, they may become kartas in preference to mothers, even when they lack experience and move to another family on marriage.[77] However, the same argument can be adduced in case of a son as well.

COMMONLY SUGGESTED ALTERNATIVES

Most of the critics of the new provision want to abolish the concept of right by birth itself. However, their solutions proceed along two trajectories-some want to retain the concept of joint family but replace the Mitakshara system with the Dayabhaga one.[78] Others want to remove the joint family system itself, as in Kerala.[79] The latter solution was considered and rejected by the Law Commission on some very valid grounds. It was realised that if the joint family system, as it then stood with only male coparceners was abolished, then all the male coparceners would hold the property as tenants-in-common and women would not get anything more than what they were then entitled to.[80] In Kerala, this problem would not have arisen because under the Marumakkattayam law that prevailed there even daughters were coparceners. Accordingly, the Law Commission recommended making daughters coparceners.

[75] Jaising, *supra* note 72, at 10.
[76] Sivaramayya, *supra* note 25, at 38.
[77] Sivaramayya, *supra* note 25.
[78] Nagendra, *supra* note 5, at 126.
[79] See, the Kerala Joint Hindu Family (Abolition) Act, 1975.
[80] 174TH LAW COMMISSION, *supra* note 42.

The common limitation of both the above suggestions is that they fail to protect the daughter, and even a wife, in cases where the deceased has made a testamentary disposition of his share. It is true that restrictions may be imposed on the right to testamentary disposition of property, yet it is debatable how beneficial that will prove to be. Making daughters coparceners is a better solution since it protects their interest right from birth. Since the father does not have an absolute right over the property, he cannot recklessly alienate or dispose of property. Further, alienations not made for specified purposes like legal necessity, would be open to challenge by daughters.[81]

CONCLUSION

The amendment of section 6 in 2005 was a significant step in the recognition of the property rights of women. It is submitted that the retention of the concept of right by birth with the inclusion of daughters as coparceners is more conducive to the protection of their interests than the abolition of the joint family system itself. Henceforth, they would be protected against the consequences of testamentary disposition of the coparcenary property by the father. If the Dayabhaga system had been adopted, or the joint family system had been abolished, it would necessarily have required imposition of restrictions on the testamentary power of a person which is violative of individual freedom. Further, now if a daughter's marriage breaks down, then being a member of her natal joint family, she would be able to return to it as a matter of right, rather than on the sufferance of her relatives.

However, the amendment is not a holistic one. It does not take into account the consequences of making daughters coparceners in terms of the other provisions of the HSA. For instance, under section 15 the husband and his heirs would be entitled to inherit property to which they should not be equitably entitled. Moreover, under section 22 they would even get a preferential right to acquire any interest sought to be transferred by a co heir. It is submitted that there is a need to amend these provisions so as to bring them into consonance with the spirit of the

[81] For instance, see Vanimisatti Anil Kumar v. Jayavarapu Krishna Murthi, A.I.R. 1995 A.P. 105. In this case the father had executed an agreement of sale. After the State Amendment Act his daughters were allowed to challenge the alienation in their own right as coparceners. See further, *supra* note 27, where this principle was upheld.

original sections, which were mainly intended to prevent an outsider from acquiring an interest in family property.[82]

Further, section 6 is not very well drafted. For instance, on a plain reading of the section it cannot be conclusively determined whether the children of the daughter would also acquire a right by birth in the property of their maternal ancestors. It remains to be seen how the courts will interpret these provisions whether they will adopt a purposive interpretation in keeping with the object of the amendment, or a more literal version. However there is a limit to judicial interpretation. To rectify the anomalies, steps need to be taken by the legislature itself.[83]

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[82] According to the author § 15(2)(a) should be amended to the following effect ....any property inherited by a female Hindu from her father or mother, or which has been acquired by her by virtue of an interest in coparcenary property, shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre deceased son or daughter) not upon the heirs referred to in subsection (i) in the order specified therein, but upon the heirs of the father..." If this change is introduced then it would automatically overcome the undesirable prospect of a husband getting a preferential right over the shares of the co-heirs under § 22. This is because the coparcenary property held by the wife shall never devolve upon him under the scheme of the suggested § 15(2)(a).

[83] The author feels that § 6(1) should read as follows: "On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a male coparcener shall,

(a)....

(b)...

(c)....

And any reference to a male Hindu Mitakshara caparcener shall be deemed to include a reference to a daughter of a coparcener

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