THE Hindu Succession Act, 1956 (HSA) is an uneasy compromise between the conservatives who wanted to retain the Mitakshara coparcenary and its discrimination against daughters, and the progressives who wanted to abolish the Mitakshara coparcenary altogether. In essence, the Act retained the Mitakshara coparcenary. But since last two decades, five southern States took steps to enact remedial legislations to correct the discrimination against daughters. This article considers in brief some of the ramifications of these legislations.

**Background**

Patrilineal Hindu law is divided into two schools, the Dayabhaga and Mitakshara. Dayabhaga prevails in West Bengal, Assam, Tripura and in most parts of Orissa whereas Mitakshara is followed in the rest of India. Mitakshara law is again divided into Benaras, Mithila, Mayukha (Bombay) and Dravidia (Southern) sub-schools.

One of the important differences between the two schools is that under the Dayabhaga, the father is regarded as the absolute owner of his property whether it is self-acquired or inherited from his ancestors. Mitakshara law draws a distinction between ancestral property (referred to as joint family property or coparcenary property) and separate (e.g. property inherited from mother) and self-acquired properties. In the case of ancestral properties, a son has a right to that property equal to that of his father by the very fact of his birth. The term son includes paternal grandsons and paternal great-grandsons who are referred to as coparceners. An important category of ancestral property is property inherited from one’s father, paternal grand-father and paternal great-grand father. The other categories are: i) Share obtained at a partition (ii) accretions to joint properties and self-acquisitions thrown into common stock. The point that deserves attention is that under traditional Hindu law, a daughter is not entitled to property rights by birth in such ancestral properties. In the case of separate or self-acquired property, the father is an absolute owner under the Mitakshara law.

By succession we mean the passing of property from one person (A) to another person (B) on the death of the former (A). Succession is of two types, testamentary and intestate. If a person executes a valid will as to whom the property should go on his death and his property is passed on accordingly, it is referred to as testamentary succession. If there is no valid will and the property of a deceased person passes to his heirs as provided by law, it is called intestate succession.

**Intestate Succession**

According to Section 8 of the HSA, where a male Hindu governed by Dayabhaga law dies leaving property or where a male Hindu governed by Mitakshara law dies leaving his separate or self-acquired property, Class I heirs will inherit his property and hi their absence class II heirs of the Schedule. The Class I heirs succeed simultaneously, that is, together, and they are twelve in number. Of these mother, widow, son and daughter are primary heirs and the remaining are the near heirs of a predeceased son or paternal grandson, or son and daughter of predeceased daughter.

Diagrammatically put:

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  of Daughters, Sons & Widows
  Discrimination in Inheritance Laws
  Dr. B. Sivaramayya

  Diagrammatically put:

  PRE-DECEASED SON
  5 Widow  6 Son  7 Daughter
  PRE-DECEASED DAUGHTER
  8 Son  9 Daughter
  PRE-DECEASED SON OF A PRE-DECEASED SON
  10 Widow  11 Son  12 Daughter
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Thus if the value of the properties is Rs 1,00,000 and if the properties are the separate or self-acquired properties of a deceased governed by Mitakshara law, or he is governed by the Dayabhaga law, the near heirs are mother, widow, son and daughter, they share equally each getting Rs 25,000. There is no inequality between a son a daughter but as pointed out earlier, the deceased could have disinherited any or all of them by executing a will.

**Ancestral Properties**

The crux of discrimination and inequality in the law lies in the retention of the Mitakshara coparcenary and its right by birth. The Hindu Law Committee (popularly known as the Rau committee) recommended the abolition of Mitakshara coparcenary and the conversion into the Dayabhaga coparcenary, but Parliament did not accept the recommendation. Instead it enacted that the share of the deceased father alone will be shared. That is, if the deceased leaves a female heir mentioned in Class I of the schedule or male heir claiming through such female heir (like a pre-deceased daughter’s son) then the interest of the deceased in the coparcenary will devolve according to Section 8 (Section 6). The Section further lays down that to determine the interest of the deceased we must assume that a partition had taken place immediately before his death (notional partition).

Here it may be noticed that while the son gets Rs 75,000 the daughter gets Rs 25,000 only. For the sake of competition, the divergence that is inroduced by the uncodified Hindu law of partition must be mentioned. According to Mitakshara law in the North, whenever a partition takes place between father and son, the wife of the father should be given a share equal to that of a son. It needs to be emphasized that a female member cannot demand partition. However, in the Dravidia (Southern) School of Mitakshara law (prevailing in Andhra Pradesh, Tamil Nadu and the region comprising the erstwhile Mysore state) this rule is not followed. Before the amending acts in the Southern states, the position in the North and South can be illustrated by the following examples:

“I am Ragini. Our family consists of my father Mahesh, my mother Uma and my brother Suresh. We belong to Uttar Pradesh. My father died leaving ancestral properties worth 1.2 lakhs (and that does not include agricultural land). What will be my share? First we must ascertain the share of Mahesh in the coparcenary properties. For this purpose we must assume partition had taken place im-mediately before his death (notional partition). Under such partition in the North, Mahesh, Suresh and Uma are entitled to one share each. Therefore the share of Mahesh will be Rs 40,000 and this becomes divisible among the three class I heirs with Uma, Suresh and Ragini each getting Rs 13,333.33 according to the HSA. So Ragini’s share will be only Rs 13,333.33 whereas Suresh will be getting Rs 40,000 under partition and Rs 13,333.33 under the HSA. The share of Uma will also be the same. *

In the same fact situation, if Ragini’s family belonged to Tamil Nadu. What would have been the share of Ragini? On the death of Mahesh, under the notional partition the property would have been divided between Mahesh and Suresh, as under the Dravidia school the allotment of shares to female members at a partition had become obsolete. Therefore, the share of Mahesh, Rs. 60,000 would be divided between Uma, Ragini and Suresh under the HSA with each getting Rs. 20,000 (of course this is an addition to the coparcenary interest of Suresh, that is, Rs. 60,000).

If we compare Uma’s share under HSA in the North and the South dia

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* The devolution of tenures is governed the UP Zamindari Abolition and Land Reforms Act, 1951. In the South agricultural land will also devolve according to HSA.
grams (2) and (3), her share is reduced in the North on the assumption that she would be allotted a share under notional partition.

Female Share
The contradiction that may arise in the North is: While a widow’s share under HSA is reduced on the assumption that she will be allotted a share at a partition, the actual partition will not take place if there is only one son; or even if there be no more than one, they may postpone partition indefinitely.

To meet this anomaly the Supreme Court in Gurupad v HiraBai (A.L.R. 1978 S.C. 1239) held that under a notional partition she would not only be entitled to the successional share but also to the share allottable under the notional partition. The effect of this decision is to convert a notional partition into an actual partition. Later it was clarified in State of Maharashtra v Narayan Rao (A.I.R. 1985 S.C. 716) that this result of automatic partition will ensue only if a suit for partition is filed by a female member expressing her willingness to go out of the family but not otherwise.

Inadequacies of HSA
The HSA at best is a half-hearted measure to improve the position of women. Apart from the inherent discrimination against daughters arising out of the retention of Mitakshara coparcenary, there are ways by which the policy and purpose of the Act stands defeated. Notable among them are:

- Unrestrained power to will away property to whoever a man chooses.

The law enables a person to will away all his property in violation of the moral claims of the family members.

- The general exemption granted in favour of laws of the Scheduled Tribes (This has been upheld as valid by the Supreme Court in Madhu Kishwar v. State of Bihar A.I.R. 1996 S.C. 1864)
- The non-applicability of the Act to laws providing for devolution of tenures section 3(2) of HSA, e.g. Uttar Pradesh.
- Denial of right of a female heir to obtain the partition of the dwelling house of the family and the general denial of right of residence (subject to some exceptions) of a married daughter.

Of these I will consider the implications of the first one here.

Right to Will
The law of testamentary succession applicable to Hindus, Christians and Parsees confers unrestrained power of testation. Thereby the law enables a person to will away all his property in violation of the moral claims of the family members. This freedom of testation, a legacy of English law in India, is an anomaly according to standards of comparative jurisprudence. Under Continental laws like the French and German laws, a person can dispose of only one-third of his property under his will. Muslim law limits a Muslim’s power to execute a will to one-third of his property, after deduction of debts and funeral expenses. The salutary principle of imposing restrictions on testation has not been adopted in the laws of succession of non-Muslims.

A male Hindu can now exercise the power of testation not only with respect to properties governed by the Dayabhaga law but also with respect to his undivided coparcenary interest under it.

There is reason to believe that among Hindus the will making power is resorted to deprive daughters of their rights. Even during the debates on the Hindu Succession Bill some members voiced the fear that daughters would be deprived of their rights by executing wills.

However Honourable Minister for Law brushed them away stating ‘I believe that a normal father will never do any such thing.’
State Legislations

Kerala was the first state to launch an attack on the right by birth and the discrimination inherent in it, by enacting The Kerala Joint Family System (Abolition) Act 1976. Section 3 of the Act says “no right to claim any interest in any property of an ancestor during his or her lifetime which is founded on the mere fact that the claimant was born in the family of the ancestor shall be recognized in any court”. The legislation is an overkill, because it not only abolished the right by birth vested in males under Mitakshara law, but also the right by birth vested in females under the Marumakkattayam law. The Act follows the language of the draft Hindu Code Bill closely.

The Andhra Pradesh legislation in 1985 adopted a different approach in an attempt to put an end to discrimination inherent in the Mitakshara coparcenary. It confers right by birth on daughters who are not married on the date when the Act came into force. It may be mentioned that during the debates on the Hindu Succession Bill, Hon. Pataskar, the then Minister of Law, said that such a step “is unknown to law and unworkable in practice.” The Andhra Pradesh approach was followed by Tamil Nadu (1989), Maharashtra (1994) and Karnataka (1994). Barring essential charges, the text of the amending Acts are same, while Karnataka effected marginal changes only.

The preambles of the Acts say:

“Whereas the Constitution of India has proclaimed equality before law as a Fundamental Right; and whereas the exclusion of daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto:”

An interesting aspect of the preamble(s) is that these legislatures are clearly of the view that Mitakshara right by birth violates equality before the law, while the judiciary is yet to pronounce its view of the constitutional validity of Mitakshara coparcenary.

Under Continental laws like the French and German laws, a person can dispose of only one-half of his property under his will. Muslim law limits a Muslim’s power to execute a will to one-third of his property, after deduction of debts and funeral expenses.

Other states which have not enacted similar amendments, seemingly hold that exclusion of a daughter from coparcenary is not violative of the Constitution. Thus, it will be difficult to say that the traditional Mitakshara coparcenary is valid now.

But the question is: Is conferment of coparcenary rights on a daughter as envisaged by these legislations the best way to end discrimination?

Section 29A states that “in a joint family governed by the Mitakshara Law a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son”, and it further adds that “she will have the same rights in the coparcenary property as she would have if she had been a son”.

Thus the language is wide and in the states where the amending Acts are in force a daughter-coparcener can become a karta (Manager) of the joint family. An anomaly in this context should be pointed out. The Supreme Court in Commissioner of Income Tax v. G.S. Mills approved the statement that “coparcenership is a necessary qualification for managership of a joint Hindu family” and held that a female member therefore cannot be a karta. The amending Acts remove the bar as regards daughter-coparceners becoming managers of joint Hindu families, but a widow or mother cannot be a karta even if her children are minors as she is not a coparcener, but can only be a guardian. Clauses (iv) of section 29A (cl iv of 6a of the Karnataka Act) lays down that “nothing in this chapter shall apply to a daughter married before the date of commencement of... the
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Act.” Clause V makes it clear that partitions already made shall not be governed by the provisions.

One can only surmise the reasons behind the exclusion of a married daughter from the scope of the Act (once the unmarried daughter gets the share she will not lose it by her subsequent marriage). The patriarchal notion that a married daughter belongs to an other family, or the practice of giving dowry and sometimes property at the time of marriage may account for the practice of excluding daughters. But the amounts daughters receive are, relatively speaking, smaller in value as compared to the coparcenary interest in property. In my view the distinction between a married and an unmarried daughter is not a reasonable classification and is liable to be struck down being ultra vires of the Constitution.

In the States governed by the Dravidia School like Andhra Pradesh, Tamil Nadu and Karnataka (omitting that portion of north Karnataka which was under the Bombay Province), the widow’s share becomes much less than that of a son or daughter. This is unfortunate as it goes against the concept of marriage as equal partnership of the husband and wife.

To take illustration, let us say I am Ragini the unmarried daughter of Mahesh and Uma. I have a brother Suresh and our family belongs to Tamil Nadu/Andhra Pradesh/ Karnataka (other than Northern Karnataka). What will be my share in coparcenary properties worth Rs. 1.2 lakhs on the death of my father in 1996?

Here under the notional partition we must allot shares to Mahesh, Suresh and Ragini as she also becomes a coparcener under the relevant state amendment. Thus each will be getting Rs 40,000.

The share of Mahesh will become divisible among his class I heirs, namely Uma, Ragini and Suresh. Suresh and Ragini will be getting Rs 40,000 + Rs. 13,333.33, that is, Rs. 53,333.33, while Uma will be getting Rs 13,333.33. Here Uma will be getting a lesser amount whereas formerly she was getting Rs 20,000.

Therefore, while a son and daughter will each get Rs 53,333.33 the widow will get only Rs 13,333.33, even if this amount could be defeated by Mahesh executing a will of his interest of Rs 40,000/- (He cannot, of course, deprive the son and daughter of their right by birth).

But in Maharashtra and northern Karnataka the position will be different. The rule of allotting a share to father’s wife at a partition between father and son exists. Therefore, on the death of Mahesh, under notional partition shares will have to be allotted to Mahesh, Uma, Ragini and Suresh, each getting Rs 30,000. Mahesh’s share of Rs 30,000 will become distributable among Uma, Suresh and Ragini and their shares will become Rs. 30,000 + Rs 10,000 that is, Rs 40,000.

In the Northern states like Uttar Pradesh, Bihar and Madhya Pradesh where the HSA without amendments is in force the position will be as indicated in (2).

Here daughter’s share is much less as compared to a son or a widow and the daughter’s share may be affected if her father executes a will with respect to his interest of Rs. 40,000/- disinheriting her.

On the other hand the elevation of daughter as a coparcener will erode the share of a widow on the in-testacy with respect to ancestral property in the states governed by the Dravidia subschool. In favour of the Andhra Pradesh approach (coparcenary rights to daughters), it is said: “Even while it discriminates against her, she is well taken care of, she is safe in her rights as a daughter, the dependence of widows on husband’s property is largely due to the fact that they do not inherit from father’s.”
The force of the above view is not denied especially as a daughter is no longer bound by the restriction imposed on her to seek partition of a dwelling house under section 23 of the HSA. But granting coparcenary rights to daughters is a weak and inadequate right. First the important category of property which is regarded as ancestral, that is, property inherited from father, paternal grandfather or paternal great grandfather, under HSA ceased to be ancestral after the decision of the Supreme Court in Commissioner of Wealth Tax, Kanpur v. Chander Sen (A.I.R. 1986 S.C. 1753). Second, conferment of right by both does not afford relief to women governed by the Dayabhaga law. Third, the measure preserves the different school and sub-schools of Hindu law and thus affects the desirable goal of unification of Hindu law.

The correct approach would be to abolish the right by birth under Mitakshara law (as Kerala has done) and impose restrictions on the power to will away property similar to those that prevail under Muslim law and Continental legal systems. Since the will has become a key instrument for disinheriting female heirs, if such restrictions are imposed by the Indian Succession Act 1925, governing the testamentary succession, it will protect the rights of succession of female heirs not only of all schools of Hindu law but also under the Christian and Parsi laws.

**Shama Shukla**

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**The Goal**

Perched  
on dilapidated ventilators  
of silence  
Words twitter  
non-stop  
discarding  
puffed feathers  
from  
uttered drops  
Like stale habits  
they gyrate  
in the air’s embrace  
Sweating together  
in a pure drop  
Melting  
pouring  
greasing  
scooping  
the long awaited goal  
Creatures one and all.