CHAPTER - V
JUDICIAL RESPONSES

An Overview

"If the law be dishonestly administered the salt has lost its flavours... if the lamp of justice goes out in darkness, how great is its darkness,"¹ Lord Bryce.

Justice is supposed to be the key word for every country and for every government. In a democratic set up the importance of judiciary has been multiplied. In the words of Bryce "there is no better test of excellence of a government than the efficiency of its judicial system."²

Democratic governance over the centuries has emerged as the most successful political experiment in the history of human civilization. Democracy encompasses in its fold the dignified existence of all human beings advocating liberty, equality, and justice as pre requisites to enable every human being to live and progress with self-respect and dignity. In its onward march democracy has attuned itself to the native realities and emerging situation in individual countries. India has attained freedom after centuries of foreign subjugation. It was a great challenge for independent India to evolve system of governance with diverse language, culture, religion and stages of development in consonance with tradition and values.

² Ibid p. 421.
A strong independent judiciary, subscribing to the highest ethical values, is the greatest strength of the democracy. It is needless to say that in a democracy covered by “the rule of law, judiciary is the sentinel on the qui-vive to protect the rights of the citizens and to hold the scales even between the citizens and the state”.

India a sovereign socialist, secular and democratic Republic enumerated the powers and responsibilities of the organs of the state to be the facilitators of national weal. The spirit of the constitution clearly delineates harmonious relations among the various organs.

Judiciary, which is the interpreter of the Constitution and the custodian of the rights of the citizens, it must be independent and impartial. Judiciary have the mandate only to interpret the laws not to lay down general norms of behaviour for the government and the people to be considered binding on all as the law of the land. The scope of judicial review, thus, is confined to seeing whether the impugned legislation falls with in the competence of the legislature or is consistent with the fundamental rights guaranteed by the constitution and its other mandatory provisions. Some issues on which differences have crapped up relate to the powers of courts to review the laws.

The debate on judicial activism has gained ground in recent years, eliciting both admiration and criticism from various quarters. There is difference of opinion among the critics, some critics have the views that in ‘judicial activism’ sometimes the judiciary is
transgressing its prescribed jurisdiction and entering in the domain of the legislature and executive. Some others feel that if the other organs of the state are found to have fallen short in the discharge of their constitutional obligations, the judiciary is well within the rights to take the necessary corrective action. In this context, it is most important that every organs of the government have to look judiciously at different perceptions of specific issues and ensure that there is no injustice prevalent in the society.

Inspite of the plethora of progressive and protective legislations, we have failed to up lift the socio economic and political status of woman and to place them at par with their male counterpart in different walks of life. In such a situation the role of judiciary in providing social justice to woman become decisive. The Indian judiciary has played a creative role in this regard.\(^3\)

Judicial activism has introduced and elaborated the new ideas, notions and conceptions in the process of deciding the case at hand.\(^4\) Because it is the duty of apex court to fashion itself as a forum of not only to deliver a justice and pay merely a lip service but it must become a forum of articulating, remolding and reinventing the mechanism and the rights to deliver justice to millions of starved and shackled women. For the maintenance of purity in administration of the justice, probity and rectitude of conduct of the judiciary should be laudable. "To keep the stream of justice clean and pure the peoples of higher echelons must be endowed with sterling character, integrity and upright behaviour, erosion there of would undermine the efficacy

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\(^3\) Muthamma v Union of India, AIR (1979) SC, 1868 at 1870.
of the rule of law and the working of the constituting itself. These persons must not be mere men of clay with all the frailties and foibles, human failing and weak character that may be found in those in other walks of life. They should be person of fighting faith with tough fiber not susceptible to any pressure, economic, political or of any sort."

Before passing through the role of judiciary in improving the socio-economic conditions and the property rights of women, it is necessary to have a glance over the historical background and a very short look over the development of the Indian legal and judicial system.

**Historical Background**

The roots of the law and legal system are deeply buried in the past. It is the fruit of the endeavours, experiences, thoughtful planning's and patient labour of a large number of people through generation. Law cannot be understood properly when divorced from the history and the spirit of the nation whose law it

In India, with the beginning of the British period, our tradition of the hoary past perished away. Though the application of the personal laws in the matter of marriage, divorce, adoption, inheritance and succession were kept untouched. The Hindus and Muslims were governed by their own respective personal laws with the help of native officer. But with the passage of time the English judges felt that they must understand the real nature of the law. So many law books were translated into English in the guidance of the experts. The most famous work in the field of Hindu Law is A Code of Gentoo Laws published at London in, 1776. In the era of Muslim
law, the Hedaya\(^5\) is famous. With the passage of time the English Judges were able to understand the languages, habits and traditions of Indians and administered the laws, without the help of Maulvies and Pandits (the native law officers).

**Development of the Indian Legal System**

In the 17\(^{th}\) century A.D, the Britishers brought their English Common Law and their own traditional system, into its administration. At first, the English judicial system was designed at the Presidency Towns and dealt with the Englishmen. But with the march of time the adjustment had been made to provide the justice to the Indians also. To begin with Madras, which was the first Presidency Town, it extended to the whole India, with the usurping political power in various parts of the country.\(^6\) Under the plan of 1772, by superimposing English administration on the pre-established system of Qazis Courts, Warren Hastings set up, what the legal historian now call, the Adalat System.\(^7\) The civil and criminal high courts set up, under the system, were called Sadar Diwani Adalat and Criminal Court. To function at the district level the Mufasil Diwani Nizamat Adalat was designated. In 1774, Calcutta, Bombay and Madras, each had a Supreme Court under the British Parliament's Regulation's Act of 1773. With their jurisdiction defined by relevant laws often over lapping and give rise to conflicts. These courts of higher jurisdiction Sadar Diwani Adalat, and Sadar Nizamat

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\(^5\) Jain M.P.: Indian Legal History p. 583.

\(^6\) Ibid p. 11

\(^7\) Mehmood Tahir: Islamic Law in Indian Courts Since Independence p. 1.
Adalat were separately set up, for the acquisitions of the British in North India.\footnote{Ibid.}

**Role of Judiciary in Developing the Different Laws**

Introducing social reforms, through law, is always problematic because of its acceptability and implementation. Reform law is always imposed law because they are the product of some elite whose value system and culture is different from the masses. These reform laws prevailed for centuries and hollowed by the religion, through its course of maturation, depicts the sentiments of millions and symbolizes as their cultural identity and their very life.

The impact of the changes can be perceived by the role of judiciary in interpreting and implementing the law. The best laws can be rendered meaningless by ineffective implementations by the justice delivery system. As law is always, in a general statement and there are so many cases which cannot be covered within the general terms. At this time the role of judiciary is, to keep its eyes on the whole system and scenario as well as on the particular case. If the court focuses only on the particular people before it, it may do justice in that particular case and yet make, very poor general policy.

So it is often said that hard cases make bad law. Sometimes the judiciary is confronted with very peculiar situation, where it has to correct the Parliament's technical error. It has to give effect to the intention of Parliament. The public expects that the text of a statute be construed literally, but some time the judiciary has to interpret it liberally in the wider interest of public as in *Monika Gounder v*
Arunchala⁹ where it was decided by the full bench of Madras High Court. On the death of sole surviving coparcener, the widow of a predeceased coparcener did not take from him, by survivorship. The result was that she could never have more than half the estate. This decision was given after a long time of the Act of 1937.¹⁰

Many cases are perfectly and correctly decided on a technical basis but are wrong in principle. A case, which is certainly bad law, when looked as a piece of judicial therapy for an unhealthy society, on the other hand when viewed through telescope of stare-decisis, it may be very sound. The two distinct criteria the technical and social sometimes meet happily and the decision, passes both the test.

After the above discussion, it is evident that how important role, the judiciary or judicial method of any legal system; play in developing and moulding any particular law or legal institution. Now we will see how judiciary has affected the Indian legal system of Hindus, Muslims, Christians, and Parsis since British period till now.

Islamic law

"O ye who believe, be maintainer of justice, bearer of witnesses for Allah's (SWT) sake though it may be against your own selves or your parents or near relations, be he rich or poor. Allah (SWT) is most competent to deal with them both, therefore do not follow your low desires, lest you deviate and if you serve or turn aside then surely Allah is aware of what to do."¹¹

¹⁰ Hindu Women's Right to Property Act, 1937.
¹¹ Al Quran IV : 35.
“Be just that is next to piety and fear God, For God is well acquainted with all that ye do.”

Under Islam the concept of justice is equality. There should be no discrimination and impartiality between the high and low, prince and peasant, white and black, Muslims and non-Muslims, male and female. In equal situation equals should be treated equally.

In Islamic terminology the function of the administration of justice is called ‘qada’. According to Muslim jurist the judicial work is a part of great responsibility, entrusted by Allah (SWT) to human beings. It is one of the foremost duties after the belief in Allah (SWT) and one of the highest forms of worship.

According to Ibn Farhun “The Qada is to act as an intermediary between the creator and the creature in order to perform and execute among them the orders and commandments of the creator through the Divine Book and the Sunnah.”

About the importance of the administration of justice, Mohammad Shahir Arsalan reported, “a complaint of mal administration and disruption in politics was once made to Sir, W. Churchill. He replied that if there was no disruption in the administration of justice, there would be no fear upon Britain.”

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12 Al Quran V : 9.
15 Md. Shahir Arsalan; Al Qada wal Qudat, p. 8 Dar-al-Irshad, Beirut 1389 H.
The knowledge of the law, for the proper administration, is necessary. In support of it, two cases of Islamic law held in the period of Hazrat Ali, can be cited.

A woman came to Hazrat Ali at the time when he is about to ride his horse. She said, "Commander of faithful, my brother has died leaving behind him two daughters, mother, wife, twelve brothers and myself and six hundred dinars but my brothers have given me only one." Hazrat Ali replied, "They gave you justly" and drove his horse away. This landmark judgement shows, the command of Hazrat Ali over the law of inheritance, because it involved an intricate question of law.

The other case is, that two friends sat to have a lunch, one had fives loaves, the other three. On their invitation, a stranger ate with them. He gave eight dirhams to them, who have five loaves took five dirhams and three dirhams gave to other. But the later one demanded half. Hazrat Ali solved the dispute. He said, that according to justice the later one is entitled only one dirham.

To understand, the real spirit of Islamic law this brief discussion was necessary. The law and justice cannot be maintained without being fully, conversant of the law. How the Islamic law is administered today and what justification is done with the law, is a question of great importance. Keeping this background in mind, we will see the contribution of Indian judiciary, in the field of the woman's property right in Islamic perspective.

In Pre-Independence Period

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16 Haji Syed Mohsin Amin, Amute; Qadwatha Muhayyir-al-Ugul p. 136, Chapakhanah Islamiyah, Tehran 1333.
17 Al-Muhib-al-Tabari; Al Riyad-al-Nadirah fi Manaqib-al-Asharah, Matboah Dar-al-Tahif 1372 H.
The pre independence period was the period of British rulers in India. Here I will not go in the history of Mughal period or before that. I have to cover from the British period because there is a pragmatic reason to confine, the study to the British period only. As the present judicial system is, what the Britishers had created. It is also necessary to see, whether it has any co-relation, continuity or integral relationship, with the pre-British institutions.

The personal enactment, which the British Indian legislators gave to this country, were legislated by them wholly in English, in letter and spirit, in form and substance, in style and format. They were interpreted by British Indian courts exclusively in accordance with English judicial precedents, and English principle of interpretation of statutes.\(^\text{18}\)

Though, the policy of Britishers was, that the Muslims and Hindus would be governed by their own personal laws. The Privy Council, itself warned the courts that they are not free to deduce any rule of law, based on the Quranic text and reported Hadith. In *Abdul Fata Mahammad Ishak v Russomoy Dhar Chowdry\(^\text{19}\)* and *Baker Ali Khan v Anjuman Ara Begum\(^\text{20}\)*, the court cautioned, that fundamental principles of Islam and the religion are so intermingled, that it would be extremely dangerous to draw a fresh logical inference from old and undisputed texts. But this role of Privy Council hindered the

\[^{18}\text{Mehmood Tahir : Personal Law in Crisis p. 103.}\]
\[^{19}\text{22, IA 76.}\]
\[^{20}\text{30, IA 94.}\]
development of Muslim law. The, eminent jurists also criticized the role of judiciary. Fyzee states.\textsuperscript{21}

“This attitude, natural enough in India where the majority of Muslims, being orthodox were averse to any change in the ‘Holy Quran’ Shariat is the result of the combined effects of the doctrine of ‘taqlid’, as understood by the later jurists and the common law doctrine of precedent, which tells the judge to interpret and followed, rather than create and expand the law. It has had during the two centuries of British rule, the effect of keeping the law stationary and static except for two broadening influences legislation and the healthy introduction of principles of English equity.”

In this way, the well-recognized principle of Ijtihad was not prevalent in the British period. Thus, Muslim jurists were denied the right of independent inquiry and were bound by the doctrine of taqlid, which stopped the growth of law. But it does not mean by the above discussion, that there was no application of equity, justice and good conscience, in the case of a Muslim. Actually there was not much distortion of Muslim law in British period. To know, what is the contribution of Britisher to Muslim law, the case study is necessary.

The most important and famous case in the field of Muslim law of inheritance was, the \textit{Patna case},\textsuperscript{22} which tells the misadministration of British judicial system. This case was bitterly criticized and created terror in the heart of the people. Even Warren

\textsuperscript{21} Fyzee : Out line of Mohammadan Law, 51 (1974).
\textsuperscript{22} Willson : Anglo Mohammadan Law p. 102.
Hastings commented adversely on the way, the Patna Council had acted. He wrote to the Council, "I can not but take notice of the great irregularities, in the proceedings of the law officers, whose business was solely to have declared the laws. The Diwani Court was, to be judge of the facts, their takings on themselves to examine witnesses was entirely foreign to their duty. They should have been examined before the adalat."

Though, the Patna case was decided according to the Muslim law of Inheritance but the afterwards proceedings of the implementation of the decision, was wrong, harsh and out of the jurisdiction of the court. The facts of the case were – Shahbaz Khan had no issue so he expressed his desire to adopt his nephew Bahadur Beg and hand over his property but before it was done, he died. Then, the dispute arose between the widow and the nephew. The widow claimed the whole property, on the basis of a gift and nephew on the basis of adopted son. The proceedings were wholly entrusted to the native law officers. There were many irregularities during the proceedings of the case, as no witness was examined on oath and Begum’s claim was rejected. As there is no adoption in Islamic law, the claim of Bahadur Beg was also rejected and according to the law of inheritance of Muslims, the shares were allotted to them ¼ to the widow and ¾ to the Shahbaz brother (the father of Bahadur Beg).

The whole proceedings were exparte, without any notice being given to the Begum. The Begum was not satisfied with the decision
and approached, to the Supreme Court. By this way the case became more critical.

The action was taken against Bahadur Beg and the law officers, on the basis of the proceedings, which were illegal and unwarrantable. Therefore, the Begum was held, entitled to the whole property on the basis of gift deed. In this case, the Supreme Court had also been criticized, for taking cognizance of the acts done by the law officers, in the discharge of their judicial functions.\(^{23}\) This case was decided in 1777, 1778 & 1779.

Another important case of law of inheritance was *Rajah Deedar Hussain v Ranee Zahurunnisan*\(^ {24}\) In this case the Shia sects of Muslims were, first time made entitled to govern the succession by their own law of inheritance, till then, they were the subject of Sunni law of inheritance. There are outstanding differences in the scheme of inheritance under these two sects of Islamic law. Arnould J lucidly describes the historical origin of these two sects.\(^ {25}\)

The justice equity and good conscience was applied in the case of *Munshee Buzloor Rahim v Shamsunnissan*\(^ {26}\) By this case the controversy arose whether the Muslim law be overridden by the rule of justice, equity and good conscience and that conflict was resolved by the court in the case of *Mohd Kaden v Ludden*\(^ {27}\) that the personal law could not be overridden.

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\(^{23}\) Jain M.P.: op cit, p. 89-93.

\(^{24}\) 2M I.A. 441 (1841) See Hayatun Nisa v Md. Ali Khan, 71 IA 73-74

\(^{25}\) Advocate General of Bombay v Mohd Hussain Hussaini (1866) 12 BHCR 323.

\(^{26}\) 11 M.I.A. 551 Fyzee Cases 281.

\(^{27}\) ILR 14 Cal. 276, 286-7.
Another controversy, about the adoption of the old and new juristic interpretation of the Holy Quran, arose in the case of *Mohd Jaffer Bindaneem v Kulsoom Bi Bi*,\(^{28}\) The dispute, in this case, was related to the maintenance of widow, in addition of her share in inheritance. The Privy Council has adopted the juristic opinion of Hedaya and Imamia, which condemned any such right of widow and rejected the re-interpretation of Ameer Ali J, which was in support of this widow. This judgement was bitterly criticized by the legal luminaries and jurists of that time and later on. I also agree with the view of Daniel Latiffi\(^{29}\) that the Quranic verses be interpreted in “*a healthy and humane principles for the protection of widows.*”

The views, of Sir Sulaiman J, in this connection are excellent. He opined that, it is the duty of courts in case of divergent opinion, when it seems impossible to ascertain the comparative, merits of the authorities, the view which is more in accordance with equity, justice and good conscience,\(^{30}\) should be adopted.

In *Mirza Hashim Mishkee v Agha Hussain*, the views, on the spirit of Islam, given by Chari J was strongly criticized by Tayyabji and other legal cleric and fuqahas, while speaking about the spirit of Islamic law, he had over looked the important consideration, when he put forward the position of Hanafi law in relation to female share. It is one of the fundamental principles that males take twice as much as females. If such was the principle no explanation forthcoming why cognate like uterine brother and uterine sister, grand parents (in

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\(^{28}\) 24 I.A. 196.

\(^{29}\) Daniel Latiff: Change and the Muslim Law (ILI) Islamic Law in Modern India 99-102 (1972).

\(^{30}\) Aziz Bano v Md. Ibrahim Hussain ILR (1925) 47 All 823.
circumstances in which the Holy Quran makes them sharers), take equal shares. The real principle, as explained above, is that newly entitled heirs (other things being equal) take half as much as old established heir whether male or female. It is accidental, that all female heirs are newly introduced heirs because before Islam, there was no concept of woman's property right at any place of the world, except in Hindu law where Stridhana prevailed. That is why, it is considered that it is the rule of Islamic law that male take twice of female but where both male and female were newly introduced, there is no such distinction between their share. He further says, that all the newly introduced heirs by Holy Quran encroached the right of male agnates. The spirit of the innovation may be expressed in the formula:

"Unto her, that hath not and unto the relations of, shall be given: and from him that hath shall be taken a little (or may be the whole) of what he seemth to retain."

The distortion of Islamic law was not done consciously or deliberately by Britishers but the fact is that they were ignorant and not conversant of Arabic and Persian. So they have to rely on the translated work of Hedaya or Fatwa-e-Alamgiri. About Hamiltons Hedaya, Maulvi Mohammad Rashid of Burdwan pointed out, some mistakes and notified its to the then, Chief Justice T.H.Harrington, who however chose to keep mum. These distorted principles of Muslim law were gradually compiled in books like W.H. Mc.

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31 Tayabji, op cit p. 805.
32 Ibid p. 807
33 Mehmood Tahir : Op cit p. 52.
Naugthan's Principles and Precedents of Mohammaden Law, N.E. Baillie's two volume's of Digest of Islamic law, Fitzgerald's Mohammadan law. An Abridgement and R.K. Wilson's Anglo-Mohammad law etc.\textsuperscript{34} about the distortion of Islamic law and Hindu law Justice V.R. Krishana Iyer himself admitted, in the case of \textit{Yousuf v Sowramma}.\textsuperscript{35}

"Marginal distortions are inevitable when the Judicial Committee in the Downing Street has to interpret Manu and Mohammadan law of India and Arabia,"

But the contribution of the British judicial system is also adorable. In \textit{Durga Das v Mohd Ali}\textsuperscript{36} and \textit{Ali Zamin v Akbar Ali}\textsuperscript{37} a childless widow was held entitled to a share in movable property and in case no other heir to return also in immovable property.\textsuperscript{38} In \textit{Gulbaro v Akbar Khalid}\textsuperscript{39} a lady was authorized to a decree for possession.

In \textit{Hasina Bibi v Zubaida Bibi}\textsuperscript{40} the reason was given to the rule of reducing share of widow from 1/4 to 1/8 that it was done for the benefit of sons and daughters but where there is only a daughter whose share is also prescribed the court held that no reason to reduce the widows share. At this time we took the spirit of the law rather than the letter of it. The case should be decided on the equity, justice and good conscience. The Privy Council applied--?

\begin{itemize}
\item \textsuperscript{34} Ibid p. 54.
\item \textsuperscript{35} (1970) KLT 477.
\item \textsuperscript{36} AIR (1925) All 522.
\item \textsuperscript{37} AIR (1928) Pat. 411.
\item \textsuperscript{38} AIR (1935) Oudh 78
\item \textsuperscript{39} AIR (1936) Peshawar 178.
\item \textsuperscript{40} 43 IA 294.
\end{itemize}
'The rules of equity and equitable considerations commonly recognized in the court of Chancery in England are not foreign to the Mussalaman system, but are in fact often referred to and invoked in adjudication of cases.' By the above discussion it can be deduced that the judiciary have the mixed role in relation to women’s property right, some time it held the case, taking the literal meaning of the law of inheritance. But some time it go beyond the limits and not hesitate to bestow the mother’s full share instead of the presence of daughter. Actually what distortion of Islamic law was done in the period of Britishers that was not intentional? Instead the steps taken by the judiciary or British rulers were precautionary not to disturb the established law. As there was a system in Common Law, that the courts were bound to follow the precedent established by the superior courts. Though by this step the development of Islamic Law was much affected and some bad precedent, which were established, be continued till now.

In Post Independence Period

After the independence, the law relating to women’s property right has passed through different channel of judicial process. Generally, the judiciary, in independent India, has adopted and based its decision upon, what the British judges said and decided in their period. The judiciary hesitated to put its own construction and deduced analogical reasoning from the original sources. There are very few judges, who bother for the real justice and deviate, from the old established authorities. The reason, behind it, is that the personal law is so sacrosanct, that no interference with in be
permitted. But it is the matter of regret that the anti women’s customs allowed to prevail, inspite of the pro-women provisions of Islamic law. For example, the custom of excluding the females from inheritance is still prevailing in many parts of India even after the 58 years of Independence.

The anti women customary laws, which disentitle the females from inheritance makes the judiciary confused. Some cases have been decided in favour of females and customary law was not allowed to prevail. But in so many cases the judiciary favours these customary laws. So to understand, why customary laws are so much favoured in independent India we will go little back and begin it with the British period again.

In *Hira bai v Sonalee* the question before the Privy Council was, whether Khojas, Cutichs, Memons and Bohras who are converted Muslims and still follow their Hindu customs, specially in matter of inheritance, which exclude females from inheritance, be governed by Islamic law or customary law? In this instant case a Khoja girl claimed her share in her father’s property under the provision of Islamic law. But her claim was not accepted and the custom got preference over the Islamic law. Commenting on this decision Rankin J, observed:

“This is a very important decision so far as it removed all danger that the law of India should attempt to enforce any standard of Islamic Orthodoxy it must command approval.”

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41 Ind. Dec. (O.S.) IV 100  
42 Rankn; Custom and the Muslim Law in British India, 25; Transaction Grotius Society, 89 (1939).
In the above-mentioned case Privy Council has given many arguments in support of customary law. This decision was affirmed in the case of *Khatu Bai v Mohd Ataji Abu*, who were the Halai Memons of Porbandar.

Later on the Privy Council itself in *Jwala Buksh v Dharma Singh*, was doubtful to admit the custom against Islamic law and in *Jammya v Diwan*, the custom, excluding daughter from inheritance, was not allowed against the women's right of inheritance. But in *Md. Ibrahim v Shaik Ibrahim*, the position was again reversed and Privy Council clearly stated— that custom would get precedence over the Islamic law, governing the succession in a particular community of Mohammadan as Mappilla community.

In the case of Punjab, Kumaon Hill and Oudh, the custom got preference and the females were allowed to be excluded from inheritance by the Privy Council. Though in *Abdul Hussain v Sona Dero*, in absence of a clear proof of a custom the females were allowed to inherit.

Upon this anti-woman attitude of Privy Council, there was chaos and distress amongst Muslim females and the right thinking Muslim males also. Muslim Women Organizations and Jamait-ul-Ulma-e-Hind made much hue and cry. The result of that is, the Act of

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43 50 I.A. 108-111.
44 (1866) 10 MIA 511, See also: Surmast Khan v Kadir Dod Khan, IFB Ruling N.W.P. (1866).
45 (1901) ILR 23 All 20.
46 AIR (1922) P.C. 59.
49 45 I.A. 10 (1917) Fyzee cases 94.
1937.\textsuperscript{50} It was presumed that all controversies would come to an end. As according to the provision of section 2 of the Act of 1937, Islamic law of inheritance would be compulsorily applicable to all Muslims but of the provision of Section 3 of the Act of 1937, allowed the customarily laws application in case, of will if one had not choose for the application of Islamic law. This created confusion and set at naught the general provision of the Shariat Act relating to compulsory application of Islamic law in respect of inheritance.\textsuperscript{51}

**During first Decade of Independence**

With this background we will proceed with the decision of Post Independent judiciary, which also have a mixed reaction. In some cases, the anti customary laws were allowed to prevail on the other hand in some cases they were not allowed. The same position of British period exists till now after 58 years of independence.

In the case of *Sahul Hamid v Sultan*,\textsuperscript{52} the question before the court was about the concept of joint family, (in which the coparcenary exists) whether exists in Muslim law or not? The court held, that Muslim law does not recognize the joint family of Hindu Jurisprudence. As a coparcener the Hindu females are not allowed to inherit, but now by the amendment Act of 2005 the daughter is also be a coparcener and allowed to inherit the ancestral property along with the son.

\textsuperscript{50} The Muslim Personal Law (Shariat) Application Act of 1937.

\textsuperscript{51} See- Mehmood Tahit: Muslim Women in India (Religion and Law Review) VI : 1 (1977).

\textsuperscript{52} AIR (1947), Mad. 287.
In Allayar v Rambhau, the question, about custom of coparcenary property (in which woman can have no share) was disallowed, which prevail among some Khojas Ismailies from the time in memorial.

Under the provision of Section 43 of Indian Succession Act, 1925 the mother of the deceased is wholly excluded by the lineal descendants of any degree and in their absence by the father. In Shaik Mehboob Alam v Raza Begum, the court held that Indian Succession Act, 1925, has superseded the Islamic law and accordingly the provisions of the Act would prevail, where they come in conflict with Islamic law.

In Rahmatullah v Maqsood Ahmed, an illegitimate child was held not to inherit with legitimate child as, uterine brother. In Imam v Amir, the Madras High Court rejected the settlement deed of the successive life estate in favour of male descendants, which exclusively excludes the rights of females.

In Hooriya v Munna, no custom, to exclude females from inheritance, is allowed, to prevail. On the other hand, in Bai Asha v Biban, the custom was allowed to prevail. In Abdul Jabbar v Chairman District Council Kuchery, because of the absence of clear proof of custom, the anti woman custom was not allowed to govern the law of inheritance.

53 AIR (1948) Bom. 162.
54 AIR (1950) Lah. 12.
55 AIR (1952) All 640-41.
56 AIR (1955) Mad. 621.
57 AIR (1956) MB 56.
58 8 (1956) 59 BLR 470.
59 AIR (1957) Nagpur 84 at p. 85.
In *Mubarak begum v Sushil Kumar*,\(^{60}\) it was held that under Islamic law, a sister can inherit in both the capacity, as a sharer and as residuary, along with the widow of the deceased. In *Abdul Kafoor v Abdul Razak*,\(^{61}\) the court has favoured the female, and held, if the daughter has agreed to leave her share before the succession open, it cannot be called a family arrangement and it would make no effect upon her right to inherit. In *Mohd Sandhukan v Ratnam*,\(^{62}\) the Madras High Court has held that a custom, which excludes only females from inheritance, could not be allowed.

**During Second decade of Independence**

The attitude of the judiciary towards females was not at much variance, in this decade also. Like the pre independence and the first ten years, this second decade also has mixed reaction and in many cases anti-customary laws were got preference over Islamic laws, which are pro-woman. In *Saira bai v S.S. Joshi*,\(^{63}\) the grand daughters were held entitled, to inherit as sharer with the widow of the deceased. This judgement is really appreciable. In *Khazir v Ahmad*,\(^{64}\) the court has rejected to apply the rule of survivorship to the property of Muslim deceased. In *Aziz Dar v Mst. Fazli*,\(^{65}\) the customary law of Kashmir, which excludes the daughter from inheritance, was allowed. In *Noor Bano v Deputy Cust. General, E.P.*,\(^{66}\) the question, once again, came before the court for

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\(^{60}\) *AIR (1957) Raj. 154 at p. 157.*

\(^{61}\) *AIR (1959) Mad. 131 at p. 135.*

\(^{62}\) *AIR (1958) Mad. 144.*

\(^{63}\) *AIR (1960) M.P. 260 at p. 262.*

\(^{64}\) *AIR (1960) J&K. 57.*

\(^{65}\) *AIR (1960) J&K. 53.*

\(^{66}\) *AIR (1966) SC 1937.*
consideration, about the customary law of Khojas governing succession and this ruling of Supreme Court is really significant. The Supreme Court relied on Mulla’s text that:

"Effect of the Shariat Act is to abolish, (except as to agricultural land and other matters to which the Act does not apply) the customary law of succession of Khojas."\(^{67}\)

*Ali Saheb v Hajra Begum*,\(^{68}\) in this case the question before the Mysore court, was about the doctrine of ‘Return’ according to Islamic law neither wife nor husband, is entitled to return when there are distant kindered and if there is no distant kindered, then the property will go to government, to avoid the government Escheat, the property could be reverted to the husband and wife only, if there is no distant kindered. In this instant case, one Ali Saheb died, leaving behind the widow and two daughters of his predeceased daughter. The widow gives the whole property to her nephew. The grand daughters claimed as distant kindered. The court held, that the wife is only entitled to her share and remainder be divided among distant kindered.

**During the Third decade of Independence**

Not much improvement can be found in the attitude of judiciary during the third decade of the independence and mixed reaction is evident and no concrete efforts were made by the judiciary to overcome the grievance of Muslim females. On the other hand because of the passing of the Hindu Succession Act, 1956, the Hindu females

\(^{68}\) AIR (1968) Mys. 351; (1968) 2 Mys LJ 14.
were in better position than earlier. The judiciary is also inclined towards the improvement of their conditions.

In another case, an interesting question before the court was whether the husband or wife are entitled to inherit each other in dual capacity? It means as a husband or wife and as a distant kindered. This case was wrongly decided by the divisional bench and corrected by the High Court. It was held that they could inherit each other in dual capacity, as sharer and as a distant kindered. As a husband he is sharer and as distant kindered he is entitle as residuary.

In Mumtaz Begum v S. Amanatullah Khan the question again related with the exclusion of the Kashmiri girls from inheritance though the case was decided in favour of daughter because of non-proving of the establishment of custom and not because of the contrary, to the text of Holy Quran. It means if it was proved that this custom exist from the time immemorial, it will make no effect that the particular custom is unconstitutional and un Islamic and hammered upon the genuine rights of females relating to property.

In Bai Khatija v Kaimbhai, again the conflict of custom and Islamic law relating to the succession of Sunni Bohra arose. In this case, steps, taken by Gujarat High Court, are appreciable. It says, that in order to secure “uniformity” which, the Bombay High Court,

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was so concerned with the Shariat Act, should be extended to the whole of India.

**During the fourth decade of Independence**

In this decade the judiciary leaned in the favour of Muslim females and some cases were decided according to Islamic Law which is pro-women in opposition of the customary law which still prevail in India and which totally excluded the females from inheritance.

In the case of *Ghulam Hasan v Mst. Saja*[^72] Jammu and Kashmir High Court has admitted the Islamic Law and awarded 1/3 share to daughter in opposition of customary law of inheritance. Jammu & Kashmir High Court has admitted the Islamic law and awarded 1/3 share to daughter.

*In Narunnisa v Shaikh Abdul Hamid,*[^73] one, Abdul Ghani died leaving behind five sons and two daughters. One of his son S.K. Abbas claimed his share 2/12 according to the rules of Islamic Law. The defendant contended his share, on the basis of a will, in which Abdul Ghani has bequeathed his whole immovable property to him. The question, before the court, was whether the will is valid which is made without the consent of other heirs and what will be its effect if not valid?

The court held, that it is an established law, that a bequest to an heir, either in whole or in part is invalid unless consented by the other heirs and if any one is consented, the bequest is valid to that extent only. It means to the share of that particular heir. In this instant case, one sister has given her consent but the other kept mum. Though she has the knowledge of the executing of the will. But it was held; that her silence is not an implied consent, cited Mulla – where a will contained a bequest excluding the females could not be considered. Mere silence cannot be considered as an implied consent, so she is entitled to her share.

In S.A. Halima Bivi v S.A. Fatima Bivi, one Abdul Qadir and his wife Zuleka Bivi had executed a settlement deed, in favour of his two daughters, S.A. Fatima Bivi and Halima Bivi. The son of Halima Bivi on behalf of her mother and aunt enjoyed the whole property. The income of the said property was being divided between them. The dispute arises between them when the delivering of the income was stopped. S.A. Fatima Biwi filed the suit for division of property. The court considered so many issues and also various aspects of Islamic law relating to the right of property were discussed. Throwing light over the concept of the property, the court said, “in Mohammadan family there is a presumption that the cash and household furniture belongs to the husband.” This decision is contrary to letters and spirit of Islam, since Muslim law does not make any distinction between movable or immovable property so far as the

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74 Mehboobi v Kampaiah AIR (1953) Mys. NOC 705.
75 Mulla, op cit p. 138.
question of inheritance is concerned. Though the case was decided in favour of sister.

In the case of Zulekha Bibi v Mst. Sabna Bibi, it was held that in the absence of son, the daughter is entitled to share the property to the extent of half. This decision was held perfectly applying the Islamic law of inheritance.

In Abdul Matin v Abdul Aziz, one intestate Muslim Abdul Ghafur died leaving behind only two daughters who took the property in equal share. After some time one sister has sold her share to the other sister who became the absolute owner. Halima died in 1957, leaving behind her son, Abdul Matin, a sole heir. In 1953, Salima also died leaving behind no heir except husband, Kitab Ali and Abdul Matin her nephew. Kitab Ali sold all the property of Salima, which was challenged by Abdul Matin, being the distant kindered. Gauhati High Court held that according to Islamic law, if the heir is husband or wife only, the residue will not revert to them but will go to the distant kindered. It makes no difference that her mother herself has sold the property to him.

A very peculiar case of eunuch was decided in 1990. There is a custom in the community of eunuch that the heir of eunuch is another eunuch. They follow the system of Guru and Chela and there was a custom that the property of the Guru be inherited by the Chela, if eunuch. In this instant case the will executed by Munnilal (a

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77 (1933) 145 Ind. Cas. 461; AIR (1933) Rang 393; (1885) ILR 11 Cal. 597; (1889) ILR 11 All 456.
78 (1987) 13 All LR 38 (All)
79 AIR (1990) Gau. 70.
80 Iliyas v Badshah AIR (1990) 334 M.P.
Muslim) in favour of Abdul Ghafoor (not an eunuch), was challenged by the chela Badshah alias Kamlajan, in whose favour Munnilal previously executed the will but subsequently, he changed his will. As Munnilal was suffering from cancer and in that hot days no service or help was rendered by Badshah, instead Abdul Ghafoor took care of him and also spent money on his treatment. In these circumstances Munnilal revoked the first will. The question before the court was that under Muslim law one cannot bequeath the property more than one third without the consent of his heir. The disputed property was inherited by Munnilal on the basis of above custom from his Guru Nasiban, another eunuch. The case was decided in favour of Badshah. It is submitted that the decision is doubtful as the case must have been decided according to Islamic law and in it there is no provision of Guru and Chela. As in Islamic law there are elaborate provisions about the succession of eunuchs.

During the fifth decade of Independence

Syed Fatehyab Ali Mirza v Union of India, two important questions were involved in this case, (i) whether the marriage with a Jewish lady be considered as an apostasy? (ii) Whether the spouses of Muta marriage were entitled to inherit each other? On first question the court held that Islamic law permits to marry with a Kitabiyah so it would not amount as an apostasy. This decision is appreciated by Tahir Mehmood. On the second question the court

83 Mehmood Tahir:op cit, p. 146.
held that generally Muta marriage creates no right of inheritance but if there is a clear stipulation of such type then there is no bar.

In *Mohan Lal v Commissioner of Income Tax Bombay*,\(^84\) it was held by the Supreme Court, that in partnership between father and son, after the death of father both widow and son are entitled to equal share. It is very difficult to say that on what basis the widow was held entitle to the equal share with her son. As it is neither an Islamic law nor customary law. It seems that in favouring the females the court has gone a step further.

In *Maqsooda Begum v Shanawaz Khan*,\(^85\) two questions were raised before the court.

(i) Whether the full sister has any interest in the deceased property, in the presence of widow and two daughters?

(ii) Whether in the presence of widow and daughters, the sister can be the legal representative of the estate of the deceased brother?

Answering the first question the court held, that though, the sister is not a sharer but she is entitle to inherit the property as a residuary and after the allotment of the shares of the sharers, the widow and two daughters, the residue would go to the residuary, the sister.

\(^84\) AIR (1991) SC 479 p. 480.

About the second question, the court held, that there is no bar on sister to be a legal representative. In this case the Islamic law of inheritance is discussed in detail. It is very hard to say that in the presence of children and widow the sister may be a representative. Though the court had not any objection to it.

In *Rukmani Bai v Bismillah Bai*[^66] the deceased Babu, a converted Muslim, had only one daughter as heir. The claim was made by the niece of Babu—Rukmani Bai that she should be considered as heir of Babu, as Babu was a bachelor and never married with the mother of Bismillah Bai. But it was proved that Babu had married with the mother of Bismillah and had two children with this union. The son predeceased him and only daughter survived, so she would be the sole heir of Babu and therefore would inherit the whole property, as there is no distant kindered. The property will revert to the daughter applying the doctrine of Return. There is a rule that a non-Muslim cannot be the heir of a Muslim in Islamic law of inheritance. The Hindu niece of Babu is not entitled.

In *Newanness v Sheikh Mohammad*,[^67] one Haji Ihsan died leaving behind his widow, two daughters, two sons and the children of predeceased son. The property, in question, was inherited by Haji Ihsan from his predeceased son. In this case the Islamic Law of inheritance was discussed at length. After sometime the widow, the two surviving sons and one of the surviving daughter and one of the children of a predeceased son also died. Now the inheritance had to be divided between the daughter of Haji Ihsan and the children of his

predeceased son. This was an appeal case. The Supreme Court's judgement of this case (as reported in AIR) is very confusing as rightly commented by Tahir Mahmood. The court, relying on the authority of Mulla, determined the sharer.\(^{68}\) Trial court has ascertained the shares, that out of \(1/6^{th}\) share, the widow and two daughters would get equal respective shares under law. \(1/3^{rd}\) remained as residue. According to Mulla where descendant like son, son’s son and ascendants like father and grandfather are not present then the descendants of father will take, as firstly full brother then sister. In default a daughter or son's daughter or daughter's son. In this instant case since only two daughters were survived among the five daughters left behind, the full sister takes the entire residue, which is \(1/3^{rd}\) share.\(^{69}\)

In 1999 the Gujrat High Court also decided the case of a gift deed in favour of the female.\(^{90}\)

**The Current Position**

In *Jamil Ahmad v Vlth ADJ Moradabad*,\(^{91}\) the court held, that the provisions of the U.P. Zamindari Abolition and Land Reform Act, 1950, override the rules of the succession of Muslim law. Section 171 of U.P.Z.A.& L.R. Act of, 1950 is quite discriminatory which gives strong preference for male agnates and always got judicial support.

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\(^{68}\) Mulla Op cit 18\(^{th}\) ed.

\(^{69}\) See Shahid’s Muslim Law Digest p. 163.


\(^{91}\) (2001) 8 SCC 599.
In a very latest case of 2004, *Ashabibi v Faziyabi* the question before the court was whether the widow of predeceased son entitled to inherit their mother-in-law?

The facts of the case were that one, Muslim lady Chotima died in, 1986 and her son, Abdul Samad predeceased her in, 1985, leaving behind two widows and their children. The widows claimed, their share in the property of Chotima, on the basis of a will, which was made by the Chotima in favour of her predeceased son and secondly on the basis of that, the property in question was purchased with the financial help of the predeceased son.

In consideration of will, the court found no evidence but there were suspicious circumstances, so it was not considered as a valid will. On consideration of second question, whether, they are entitled to inherit or not? It is a well-settled rule of Islamic law of inheritance that the right to inherit arises at the death of ancestor, no birthright is recognized and also no theory of representation. It is the clear rule of Islamic law that if any child dies before the opening of the succession his or her heir cannot claim his or her share. On the basis of these judicial decisions and on the authorities of the text of Islamic law, the court held that the widows are not entitled to share any property in this instant case. This decision was very harsh towards females.

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93 AIR (1953) SC 298.
95 AIR (1970) Mad. 200
96 AIR (1961) Ori. 92.
97 AIR (1951) SC 327.
Hindu Law

In Pre Independence Period:

The courts rendered a yeoman service to the cause of personal laws especially, relating to the women’s right of property. In the period of Britishers, the Hindu law underwent transformation at the hands of British courts. Mr. Derrett a great critic of Hindu Law, has glorified his countrymen for presenting the English ruler in India as ‘Patrons of Shastras’. He has given in one of his book a long list of, about fifty Sanskrit legal treaties which he claims, are attributable to British influence or patronage or possibly written in response to British request or encouragement. William Jones judge of Supreme Court of Fort Willaim at Calcutta, himself admitted: “pandits deal out Hindu law as they please and make it at reasonable rates when they can not find it readymade.”

In 1828 Governor Eliphinstones had remarked, ‘the Dhramshastras, as it is understood, is a collection of ancient treaties neither clear nor consistent in themselves and now buried under a heap of more modern commentaries, the whole beyond the knowledge of perhaps the most learned Pandits and every part wholly unknown to the people who live under it.”

The British judges used to consult the Pandits, attached to the courts. In the case of difference of opinion, on the point of law, the courts consulted the other Pandits. Sir Francis Mcnaugthen consulted 51 Pandits

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98 Derrett, J.D.M; Religion, Law and the State in India p. 225 (1968).
100 Ibid p. 588.
on a question of inheritance, in the case of Gurubullub v Persond in 1834. Hindu law came to be administered by the courts, in British India, they have faced with a number of problems, and some cases took very long time to dispose of.\(^{101}\)

A judge, in order to be able to discharge his duties properly and effectively, has to understand the psychology, the sociology and the climate of the state in which he functions. Administering Hindu Law in India the problem with the Britishers was that they were totally unaware of the surroundings and sociology of the Indian society. There are many sub-schools, by which the Hindus were governed, and they were quite different with each other.

In British period, though the Supreme Court leaned, towards the application of the laws of the particular school, to which the parties belonged. In Bai Kesarbai v Hansraj Morarji,\(^{102}\) the question was, whether a co-widow could succeed the property of a widow dying issueless, in preference to her husband’s brother and brother’s son. The case was decided, according to the harmonious construction between the Mitakshara and Mayukha School.

The earliest, reported case of Dayabhaga, was D.D.R. Dassi.\(^{103}\) In that case the widow succeeded to the exclusion of mother (father’s widow). The conflict was between the father’s widow and the widow of the deceased.

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\(^{101}\) Rungama v Acchana 4 M.I.A. 1.
\(^{102}\) 33 IA 176, 187.
\(^{103}\) (1774) Mort Montr 353.
In *Perammal v Venkatammal*, the court held that the mother stands, next in order of succession on failure of other heirs and can succeed only in the absence of a widow. Once again the judiciary favoured the widow instead of father's widow. In *Huroosundry v Rajeshsurrie,* and *Ballamma v Puttaya*, the widow was held, not entitled to inherit that property which was not vested and possessed by the deceased husband at his death. In *Sondaninoy Dassee v T. Chandra*, the restrictions on the right, to partition on issueless widow, was released by the court. In *Suraneni v Suraneni*, the question before the court, was whether according to Mitakshara School, if the agreement of partition has taken place, but actual separation is not carried out, the widow could succeed the husband property in preference to other surviving co-sharer? The court held that the widow was entitled. Though it seems that the Privy Council had perpetuated the traditional system but somewhat soften its rigours.

One of the most serious deviations of the Privy Council from, the Mitakshara view was regarding the status of Hindu women. The Privy Council took, a much more rigid and narrow view of the women’s position, based on the old texts of Manu, Katyanyana and Yajnavalkya ignoring the interpretation like Vijnaneswara. By this way the judiciary has narrowed down the concept of Stridhana, the absolute property of the women. Yajnavalkaya had defined, 

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104 (1863) 1 MHCR 223.
105 (1865) 2, W.R. 321.
106 (1894) ILR 18 Mad. 168.
107 (1876) ILR 2 Cal. 262-271, See also D. Nath v Chintamani (1903) II R 31 Cal. 241.
Stridhana restrictively but Vijnaneswara gave it expansive meaning and include in it, every kind of property acquired by a woman from any source which was judicially recognized in India by several courts. On the other hand the Privy Council in a series of pronouncement, refused to accept Vijnaneswara’s view of Stridhana. Perhaps the Apex Court found, Vijneshwara’s view too radical because, in England, until 1882, the position of married women, in the matter of their rights to property, was very unsatisfactory and the Married Women’s Right to Property Act, 1882, alleviated their position.

In the British period though the, Hindu Law was much distorted but in respect of widows property right, it always have a soft corner. The problem to administer the Hindu law was that, at the time there was no uniformity among Hindu laws of succession because of many schools and sub-schools which have their own rules relating to succession. In Hindu law very few females are entitle to hold and inherit the property. The rights given by Hindu law to the females were also not absolute and so many impediments were imposed on them. As the policy of Britishers was non-interference in the matter of personal laws, the judiciary found it’s difficult to apply justice, equity and good conscience.

109 Salem v Lutchmana ILR (1898) 21 Mad. 100, 103, 104.
111 Jain M.P. : op cit p. 598.
In Post Independence Period

After independence the Supreme Court has adopted a liberal attitude towards the women’s right to property in comparison of the Privy Council. In independent India much emphasis was given on gender justice and equality. Many legislative steps had also been taken to modernize, unify, democratize and secularize the Hindu family laws and especially to emancipate the Hindu female. Judiciary was also inclined towards the empowerment of women particularly in the sphere of economic era. Several provisions of these reformatory legislations have been challenged but upheld by the courts from time to time.

During the first decade of Independence

The Judiciary had played a very creative role because the Hindu Succession Act, 1956 which is considered a piecemeal in the field of women’s property right, was not passed and female’s had very limited property right, but whenever the matter came before the court, it did not hesitate to favour the females. Even in 1951 the Supreme Court held that the female could be a shebait.

On an issue whether the property includes the right of succession to shebaitship or not? In Angurbala Mullick v Debarata Mullick, the Apex Court gives its favour to the female. The court said that there is nothing in the Act, under Sec. 3(1) by which an inference can be drawn that a right

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112 3 Law and Society Review.
114 AIR (1951) SC 293; (1951) 1125; (1951) SCJ, 394.
115 The Hindu Women’s Right to Property Act, 1937.
of succession to shebaitship does not fall within the definition of property. If there is no legal objection to a woman being a shebait, why should she be excluded from succeeding to the same.

In 1953 on the issue of the inheritance by prostitute, the court held,\(^{116}\) that though under Hindu law a maiden was a preferential heir to her married sister. But this rule did not apply to a daughter who was admittedly married to an idol and who lead a life of a prostitute.

In 1955, Supreme Court,\(^{117}\) upheld the validity of customary law prevailed among agriculturist jats in Punjab where daughter succeeded self-acquired property of her father in preference to collaterals.

In 1957, just next year of the passing of the Act\(^{118}\) of 1956 the question before the court was whether Section 14 of the Act is retrospective in operation? This question arose because generally a substantive law is not retrospective in operation, unless it is specifically made so. But Sec. 14 appears, on its face, to be retrospective, when it declares, that the property acquired, before or after the commencement of the Act, shall be held by her as an absolute property and not as limited owner. But this retrospectively of the Act, is given to the acquisition of the property and not to possession,\(^{119}\) it was held by the court.

In another case,\(^{120}\) the court had made it clear, that for the application of Section, 14 of the Act, it was necessary that the

\(^{116}\) Sarawathi Ammal v Jagadabel and another (1953) SCR 939.

\(^{117}\) Gopal Singh and others v Ujagar Singh and others (1955) 1, SCR 86 : 1954 SCJ 562.

\(^{118}\) Hindu Succession Act, 1956.


property must be in possession of Hindu female, at the date of the commencement of the Act, whether actual, physical or constructive.

To favour the women's property right in 1959, the Supreme Court held,\textsuperscript{121} that even if a custom under which a sister may claim to succeed to the property of her brother in preference of collaterals, has not been established, she was made entitle to claim the inheritance, under section, 5 of the Hindu Law of Inheritance (Amendment) Act of, 1929. Under this Act a sister was a preferential heir of her brother against his collaterals.

**During the Second decade of Independence**

In second decade the judiciary had got the weapon of the Act of, 1956 to favour the females and generally the court interpreted the provisions of the Act, to give more and more rights to females. But sometimes-contrary views were also taken. Because in favouring females it cannot go against the express provision of the laws. In 1962 the Supreme Court held,\textsuperscript{122} that, where a Hindu holding occupancy right under the Zamindari, died leaving no son behind him, daughter could succeed to him though with limited interest.

Supreme Court was not always bent to favour the woman. In 1966, on the question whether widow is a karta of joint family. The apex court held, since coparcenership is an essential condition for the membership of Hindu joint family and a widow is not a coparcener, so she could not be a karta of joint family.\textsuperscript{123}

\textsuperscript{121} Ujagar Singh v Mdt. Jeo AIR (1959) SC 1041.
\textsuperscript{122} Sunka Villi Suranna and others v Goli Sarhiajue and others (1962) 3. SCR 653; AIR (1962) SC 342.
occasion, on the question whether widow acquiring property under the Act, could claim partition, Supreme Court\textsuperscript{124} did not give full effect to the statutory conferment upon the widow, of the same right of claiming partition as a male owner.

In 1968, the Supreme Court had to consider the question, whether after coming into force of the Hindu Succession Act, 1956 the widow got rights of full ownership and could alienate the properties without the consent of the male member of the family. It was held,\textsuperscript{125} that she had become full owner, by virtue of the provision of section 14(1) of the Act of 1956. At another place the Supreme Court had, the task of interpretation of the scope of clause (D) of Sec 8 of the Hindu Law of Women's Right Act (Mysore Act No. X of 1933). In this instant case the apex court had widely interpreted the scope of said section. The Supreme Court held that this section cannot be narrowly interpreted as giving a right, to only those females, who happen to be related to one or the other of the last two male coparcener, and the expression, mother, would include a step mother and step grand mother also, where the step grand mother was a sole surviving heir, she was made entitled to share in the joint family property.\textsuperscript{126}

On the issue of a possession of a widow as trespasser, in 1970 Supreme Court held, that before any property could be said to be possess by a Hindu female as required in Sec. 14(1) of the Act two things were necessary to be considered.

\textsuperscript{124} Satrughan Isser v Sabijpuri AIR (1967) SC 272.
\textsuperscript{125} Sukh Ram and another v Gauri Shankar and another AIR (1968) SC 365.
\textsuperscript{126} Nagindra Prasad and others v Kempon Jamma AIR (1968) SC 209.
(I) She must had a right to the possession of that property

(II) She must have been in possession of that property either actually or constructively.\textsuperscript{127}

In \textit{Vijai Pal v Dal Consolidation},\textsuperscript{128} the Supreme Court interpreted the word ‘possession’ in wider sense that the term possession is co-extensive with the ownership. But in \textit{Dindayal and other v Raja Ram},\textsuperscript{129} Supreme Court on the issue of trespasser had, held that she could not be held, to acquire any right under the Act, where she had possessed property as a trespasser.

\textbf{During the Third decade of Independence}

The attitude of the judiciary was not much changed in this period and the mix attitude remained constant. Wherever the issue was not in direct conflict with the express provision of the law, the court always had tried to favour the females.

In \textit{Sasanka v Amij},\textsuperscript{130} the question before the court was, whether an apostate widow or daughter in law could claim the benefit of the Act of 1937? The answer was in negative because the benefit was only to Hindu female when she converted to another faith, she was not a Hindu, so the benefit of the provisions of the Act, could not be given to such a woman. Sec. 26 of Hindu Succession Act made the position clear. But in another case of a Christian

\textsuperscript{127} Mangal v Rathno (1967) SC; Mahesh v Raj Kumari (1996) SC 869.
\textsuperscript{128} (1996) SC 146.
\textsuperscript{130} AIR (1974) 78, Cal. W.N. 1011.
female who married with a Hindu male under the Special Marriage Act, 1872, was consider to be entitled to a share as a predeceased son's widow, from the property of her father in law as an heir. It seemed that the apex court favoured the females where there was a little chance or capacity to interpret the provision to empower the female in economic sphere.

In Tulassamma v Sesha Reddy, the Supreme Court, had recognized, that Sec. 14(1) must receive 'most expansive interpretation'. The facts of this most important case, in which the Supreme Court had propounded so many principles which are as follows:-

The husband of Tulassamma, Venkata Sesha Reddy died, leaving behind Tulassamma as his widow in the state of jointness with his stepbrother, V. Sesha Reddy. Tulassamma, filed a petition for maintenance which was passed as an exparte decree. A settlement took place out of the court under which, Tulassamma was allotted the disputed property as a limited interest only. Tulassamma remained in possession of the property till the passing of the Hindu Succession Act of 1956. By two-registered deed, Tulassamma leased out some of the properties, which was challenged, on the basis that her interest would not be enlarged into an absolute interest, under sec. 14(2) of the Act of 1956. The Munsif Court accepted it. Then Tulassamma went to District Court, who reversed the findings of the trial court and held that sub sec (2) of Sec. 14 had no application because the compromise was an instrument in the recognition of a

\[131\] AIR (1977) SC 194. See also Vajiya v Thakarbhai AIR (1979) SC 993.
pre-existing right. In second appeal the High Court of Andhra Pradesh upheld the decision of trial court. At last in Supreme Court P. N. Bhagwati, A.C. Gupta and S.M. Fazale Ali JJ reached at the conclusions that –

- Hindu female's right to maintenance is not an empty formality. It is a tangible right against the property which is recognized by the Shastric Law.

- Sec. 14(1) and the explanation attached with it should be given, widest possible meaning, in favour of female, to achieve the object of the Act of 1956, which is to abridge the stringent provisions, against propriety rights, which were often regarded as evidence of her perpetual tutelage.

- The nature of the sub. Sec.(2) of Sec. 14 is as an exception to sub Sec. (1). This proviso should not be construed in a manner so as to destroy the very purpose of the Act.

- Sec. 14(2) applies to instrument, decree, awards, gift etc., which creates a new right, or interest in favour of female, where the instrument only confirm the pre-existing right it has no application.

- The use of express words in the explanation to Sec. 14(1) that 'property acquired by a Hindu female' at partition; or in lieu of maintenance' or 'arrears of maintenance' etc.
clearly makes sub. Sec. (2) inapplicable to these categories of property.

- The expression "possessed by" should be given a broad meaning and wide connotation which includes the actual as well as constructive possession and symbolic possession. Judiciary also leaned towards this attitude from the beginning. But this widest interpretation could not by any way extended to such an extent as to include the trespasser.

- The words "restricted estate" used in Sec. 14(2) are wider than limited as indicated in Sec 14(1) and they include not only limited interest but also any other kind of limitation that may be placed on transferee (female).

Applying the principles enunciated to the facts of the present case the judges find –

- that the properties in suit were allotted to the appellant Tulsamma on July 30, 1949 under a compromise certified by the court.

- that the appellant had taken only a life interest in the properties and there was a clear restriction prohibiting her from alienating the properties.

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133 Dindayal and others v Raja Ram AIR (1970) SC 1019.
that despite these restrictions she continued to be in possession of the properties till 1956 when the Act of 1956 came into force and

that the alienations which she had made in 1960 and 1961 were after she had acquired an absolute interest in the properties.

It was therefore, clear that the compromise by which the properties were allotted to the appellant Tulsamma, in lieu of her maintenance, were merely in recognition of her right to maintenance, which was a pre-existing right and therefore, the case of the appellant would be taken out of the ambit of Section 14(2) and would fall squarely with in Section 14(1) read with the explanation there to. It is a landmark judgement of the court.

It is submitted, that the Supreme Court has misconceptualised, sub section (2) of Section 14 as a proviso of the first sub section because both the clauses have different purposes. It is further submitted that the language of the proviso is wide enough and does not bar its application to the preexisting rights of the widow.

Another thing which draw the attention is, that Supreme Court in considering the words ‘possessed by’ takes the meaning ‘the state of owning’ or ‘having in one’s hand’ or power which is not relevant because the legislature deliberately avoid to use the words ‘owned by’ in place of ‘possessed by’ in Section 14(1) of the Act of 1956.
Since the enactment of Hindu Succession Act, 1956, there has been influx of cases each year under Sec. 14 and generally courts are liberal in favour of women, upholding the decision of Tulasamma case.

During the Fourth decade of Independence

It can not be said that the role of judiciary is not creative and pro woman. As it can not deviate from the express provisions of the codified law like previous decade there is not much improvement in this decade also and the cases are decided with the mixed reaction, some in favour and some in against but the majority of the cases are decided in favour than against.

In Dipo v Wassan Singh the property, inherited from paternal ancestor, is an ancestral property, as regards the male issue of the propositus. But if a person inheriting such property has no son, son's son or son's son in existence, at the time when he inherits the property, he holds the property as absolute owner there of. In this instant case, the last male holder of the property had no male issue and no surviving member of a joint family, who could take the property by survivorship The court held it, that the sister of last male holder has preferential right against collaterals.

In Shambhu Chandra Shukla v Thakur Ladle R. Chandra, the question before the court was whether the widow can transfer her shebaitship right by a will? Justice Per Mukharji, said, “that

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shebaitship is a property which is heritable. The right of a female to succeed to the religious office of shebaitship is already recognized by the Act of 1937. Section 14 of Hindu Succession Act, 1956 enlarge the limited right of a Hindu female to the absolute right, and there is no bar against alienation, which was imposed by the founder.

Amar Singh v Asstt. Director of Consolidation,\textsuperscript{136} in this case the nature of right and interest of a Hindu widow in her deceased husband's estate vesting in her was recognized.

**During the fifth decade of Independence**

In this decade the judiciary had passed some very significant ruling. As to favour female, it has extended the ambit of section, 14 even to include the wife of bigamous marriage as wife. In this decade the International provisions were also taken into consideration and tried to implement.

In Masilamani Mudaliar v Idol of Sri Swaminath Swami,\textsuperscript{137} a very significant judgement was given by the court because it had not only recognized the absolute ownership of females, over certain properties but also discussed various International Conventions as, The Protection of Human Rights Act, 1993 and other constitutional provisions to emphasize the concept of equality of gender. In

Raghubir Singh v Gulab Singh,\textsuperscript{138} Supreme Court has reaffirmed and reiterated the females limited estate into absolute one.

In the case of Beni Bai v Raghubir Prasad,\textsuperscript{139} an interesting question came before the apex court whether under Hindu Law the term 'wife' includes the third wife or not? As in Hindu law no bigamy is permitted so the third marriage is void, then the question arose that the benefits given to wife could be given to the third wife also? The facts of the case were that the third wife in favour of her daughter executed a will. The Supreme Court held, that to read a 'female Hindu' as only wife was totally misconceived. It is apparent that the attitude of the judiciary towards females was generally lenient and pro-women.

In Naresh Kumari v Shashi Lal,\textsuperscript{140} the court held that if the widow had relinquished her right, through the sale deed, her limited interest would not ripen in the absolute ownership or where she herself had surrendered,\textsuperscript{141} her share, in favour of her only son, the benefit of section 14 of the Act of 1956, could not be given to her. Here though the decision was not pro women but according to law.

In Velamuri Venkata Sevaprasad v Kothuri Venkasteshwra,\textsuperscript{142} the Supreme Court, on the point of the remarriage of the widow, gave, another significant judgement, 1856 says that the widow on remarriage. Section 2 of Hindu Widows Remarriage Act would be

\textsuperscript{139} AIR (1999) SC 1147.
\textsuperscript{140} AIR (1999) SC 928.
\textsuperscript{141} D.V. Jagannathan v P.R. Srinivasan (1999) AIHC 4444 Mad.
deemed to be dead. The facts of this case were that a widow remarried in 1953 prior to the Act of 1956 though her marriage was bigamous under the Madras Hindu Bigamy (Prevention and Divorce) Act, 1949 so void. The question before the court, was, whether such widow was entitled to inherit or not. The court held, that voidness of marriage could not be termed, as absolute nullity and also could not be taken into consideration to aid the conferment of right. The court held, that she was not entitled to inherit. Here the judiciary did not allow to take undue advantage of the Act of 1949 of Madras and applied the clear provisions of the Hindu Widow's Remarriage Act.

The Current Position

In Palchuri Hanumayamma v Tadikamalla Koltingham\textsuperscript{143} such a situation had emerged which was unforeseen by the legislature. As a result of enlarging the widow's limited estate the original intent of the testator to give equal benefit to the third branch of his family, had been nullified. In this case by a registered will the appellant, maternal grand father provided that his wife R "shall enjoy all my movable and immovable properties till her death," without making allocations. After the death of R each of these three daughters were to be given clearly identified share in the property. In 1944, one of the three daughters, the mother of the appellant, died. The appellant, till her marriage, lived with her grand mother R. In 1955, R with a partition deed had transferred the shares of the two surviving daughters, according to the will and kept the share of the deceased

\textsuperscript{143}(2001) 8 SCC 552.
daughter with her. In 1966, R by a gift deed had transferred that
share to one of her surviving daughter and she herself died in 1977.

The appellant challenged the gift deed which was dismissed by
the trial court and High Court, when the case had come before the
Supreme Court it was held that till 1956 R had no absolute right over
the property as this right is given by the Act of 1956 and the partition
deed was made in 1955 according to the intention of the testator.
After the Act of 1956, the share, which was retained by the widow, get
enlarged into absolute one. So the gift deed was valid. It is submitted
that though the case was decided according to the provisions of the
Act of 1956, but it was not according to equity, justice and good
conscience because the daughter of the pre-deceased daughter had
not get the share of her mother.

In *Muthusami v Angammal*,\(^\text{144}\) the father in law of the widow
made a settlement deed, with the help of Panchayat for her
maintenance, during his lifetime. In 1974, she executed a sale deed,
which was challenged. That property was inherited by father in law
through the husband of the widow. The issue in this case was that
the widow’s pre-existing right exists in the husband’s property and
not against the property of her father in law and the deed was made
by intervention of Panchayat. The Supreme Court held, that the case
was covered by Sec. 14(1). Though for time being she was not in
actual physical possession of the land, but she was in the legal
possession, as she never parted with the right of maintenance. So
the sale deed was valid.

\(^{144}\) AIR (2002) SC 1279; See also Yamanappa Dudappa Marve v Yelluba AIR (2003) Kant. 396.
In *Gulabrao Blawant Rao Shinde v C. Balwant Rao Shinde*, the Supreme Court has corrected, the grave injustice done by the High Court of Bombay. In this case the deceased has contracted two marriages and have children from both the wives. The second marriage was contracted after the death of first wife. The children of the first wife filed a suit, for recovery of their share, in the property left by their father, which was in the possession of second wife. The plea was taken, by the children of the second wife, that the property was in lieu of maintenance of second wife and she also had possession over it, which had ripen into an absolute ownership, by virtue of the provision of Sec. 14(1) of Hindu Succession Act, 1956. The High Court, held in favour of second wife. On appeal Supreme Court saved the interest of the aggrieved, by holding that there was no proof that the deceased has given the property to the second wife in lieu of maintenance and, the disputed property was also an ancestral property from which the children of first wife could not be divested, by giving the benefit of Sec. 14(1) to the second wife. The object of Sec. 14(1) is to remove the restrictions, placed by the old Hindu law, on the full enjoyment of the property of a female, but not at all, at the cost of injustice with others.

In *Jose v Ramakrishnan Nair Radhakrishnan*, the Kerala High Court has considered the two expression “Hindu female” and “in any other manner whatsoever” of Sec. 14 of Hindu Succession Act, 1956. The question before the court for consideration was, whether the limited interest of a daughter, would get enlarged to full right

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after the commencement of the Hindu Succession Act, 1956, when a male Hindu following Mitakshara law died, before the said Act? This question was answered in affirmative a decade ago by K.P.B. Marar J in Velayudhan v Ithavi.\textsuperscript{147} There could not be any distinction between the rights claimed by the widow and a daughter in respect of self-acquired property of a male Hindu. Section 14 uses the expression “female Hindu” to include daughter as well. To read ‘female Hindu’ as only ‘wife’ is totally misconceived.\textsuperscript{148} The Apex Court has given, a wider meaning to the expression, ‘female Hindu’ which includes not wife alone.\textsuperscript{149} The court has given wider interpretation also to the expression ‘in any other manner whatsoever’. Section 14, has to be read with Section 4, which gives overriding effect of the Act, whatever property in the possession of the female Hindu whether it has been acquired by her self or in any other manner whatsoever shall be regarded, her absolute property.

It is submitted that court has given a wise judgement to give every female Hindu, the benefit of Sec. 14 and thus fulfilled the intention of the legislature. Thus due regard has been given to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective.

The conditions of the tribal woman after the independence of 56 years is still a forlorn hope to achieve equality before law. The case of Madhu Kishwar v State of Bihar is a landmark decision in which they asked for loaf of equality, at least to get crumbs of

livelihood. In this case sections 7, 8 and 76 of the Chota Nagpur Tenancy Act, 1908, was challenged, as unconstitutional and discriminatory, against females. Under this Act the tribal women are excluded from inheritance. Though as unmarried daughter had usufruct right in the property of her father, till marriage and widow has usufruct right till she got an issue. This case was brought before the Supreme Court that had directed the State government to take necessary steps. The State level Tribal Advisory Board suggested, that in case of right to inheritance to the tribal woman would result in elevation of land to non-tribal. On the order of the Supreme Court, the matter was reconsidered by the Bihar Tribal Council, which also gave the same opinion. Thus the discrimination only on the basis of sex still prevails and tribal woman have no right to inherit because the property would pass in the hand of other tribe.

The decision rendered, by a majority of two against one, is regressive in the final analysis. Ramaswami J, was of the view that sections 7 and 8 of the Act, are violative of Art, 14 of the Constitution. He says that in every state, there are legislations prohibiting alienation of tribal lands to non-tribals. But the majority opinion of Punchhi and Kuldip JJ was though conservative, but took a cautious approach by giving limited relief to females. The exclusive right of male succession under the provision of sections 7 & 8 has to remain suspended so long as the right of livelihood of the female descendants of the last male holder remains valid and in vogue.

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150 The Chota Nagpur Tenancy Act, 1908.
In 2005, some very interesting questions were raised before different High Courts of India relating to the issue of inheritance.

In *Brijendra Pratap Singh v Prem Lata Singh*, a settlement deed between two brothers was, that on the death of either of the parties the male lineal descendants of that party alone will succeed how so low ever to the exclusion of all female heirs. It was challenged, on the basis that it will amount legislating new law of inheritance, which was at variance of Hindu law of Succession Act of 1956. Though, in Hindu law, it is permissible to gift or to will in favour of son or grandson the whole property, excluding all female heirs. But in this instant case, there was no will or gift, they merely laid down an abstract rule of succession, which was against law.

A Hindu cannot create the line of succession qua a settlement, because it will amount to legislating a new law, which is not permissible. The daughters and widow also have the right to inherit the property. This deed cannot be treated as a will or gift under which the Hindu can make a will in favour of his son or grandson, to the exclusion of daughter or granddaughter.

In *L.H. Vidyapoornam v L.H. Premavathy*, a Hindu male died, leaving behind three daughters, three sons and a widow. The intestate had left self-acquired property, over which the plaintiff had no possession, so it was contended that the plaintiff was not entitled to file the suit. The court held, that it would be presumed that the

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plaintiff had been, in possession of the said property as notionally partition among them till the actual partition took place. It was very complicated case in which by a fraudulent will the rights of the daughters in the property of their father was tried to extinguish, but by minute observation the court had prevented the gross in justice to be done.

In another, very latest case of 2005 *Ravi Kirthi Shetty v Jagathpata Shetty*,\(^ {153} \) the benefit of section 6-A, which is inserted by Karnataka Amendement Act 1994,\(^ {154} \) was claimed by daughter. The facts of the case were that one Raju Shetty died leaving behind two sons and two daughters. The property was divided among them, according to the provisions of section 6 of Hindu Succession Act, 1956. But one of the daughter claimed that she was unmarried at the time of the death of her father, so she must be given the benefit of section 6-A of Hindu Succession Act of 1956. In absence of any proof that she was unmarried, at that time, the court had not accepted her claim. It is submitted that though judiciary generally bent towards female right but in the absence of material proof it is bound to do justice with males.

Very recently, the Supreme Court has to construe a very different question whether the wife of a murderer be considered as the widow under section 25 of the Hindu Succession Act, 1956 ? There is a provision under section 25 of the Act of 1956 that the murderer be deemed as the predeceased. So whether she is entitled

\(^ {153} \) AIR (2005) Kant. 194.

\(^ {154} \) By the provision of the Section 6-A an unmarried daughter be considered as a coparcener and is entitled to equal share to his brother.
to inherit the property as the widow? It was pleaded by lawyers of the widow. In Vallikannu v R. Singaperumal, the above-mentioned question was raised. The facts of the case were as such. His only son murdered one, Ramasami. There was no other survivor of Ramasami as his wife was already divorced and remarried. Under the provision of section 25 read with section 27 of Hindu Succession Act, 1956, the murderer who was the only son should be deemed to have predeceased, so not entitled to succeed the estate of his father. The wife of the son claimed that she was alone entitled to all the properties. Then question was, whether the wife of a disqualified son who succeeds through the husband could be entitled to succeed the property? The answer of this question was given far back before the passing of the Act of 1956, by the Privy Council in negative, on the basis of equity, justice and good conscience in Kenchava Kon Sanyellappa Hosmani & Anr v. Girimallappa Channappa.

The Supreme Court, in the instant case referring the judgement of Privy Council of the above-mentioned case, has explained to the objects and reasons for enacting section 25 as –

"A murderer, even if not disqualified under old Hindu law from succeeding to the estate of the person whom he has murdered, is so disqualified upon principles of justice, equity and good conscience. The murderer is not to be regarded, as the stock of a fresh line of descent but should be regarded, as non-existent when the

156 AIR (1924) PC 209.
succession opens.” The Supreme Court held that the wife of the son cannot lay a claim to the property of her father in law.

In Priyamvada Devi Birla v Madhu Prasad Birla, a novel question very recently in 2006 came before the Calcutta High Court for consideration. What is caveat-able interest? The second question was, whether the sister of the husband was entitled to inherit, being a class II heir, if there was no class I heir?

In answering the first question that what is caveat-able interest? The court has said that the existence of real interest or even bare possibility of real interest in estate of deceased, is said to be the caveat-able interest.

Now come to the second question the court held that where a lady dying intestate without having any class I heir of her own or of her husband, the estate would devolve on sisters of her husband who were class II heirs and after them on their husbands and sons etc.

Implementation of the New Amendment Act of 2005

Recently a case has been decided by the Kerala High Court regarding the impact of the amendment in Section 23. In S. Narayan v Meenakshi (AIR 2006 Ker. 143) the question before the court is – whether omission of section 23 of the Hindu Succession Act by the Hindu Succession Amendment Act, 2005 would have any impact on a suit for partition or appeal there from pending on the date of the commencement of the Hindu Succession Amendment Act, 2005. 

\[157\] AIR (2006) Cal. 6 (Jan.)
The facts of the present case are one Ramaji died leaving behind her four daughters and a son. After the death of Ramaji one of her daughter who is the plaintiff of the suit, obtained purchase certificate from the Land Tribunal in her name. The other sisters released their fractional shares in favour of the plaintiff. Thus the plaintiff claimed 4/5 shares and contended that the defendant has only 1/5 share.

The defendant contended that the property does not belong to Ramaji but to her husband and before the commencement of the Hindu Succession Act, 1956 all sisters were married, therefore they are not entitled to any share in the property. The lower courts found that the property belonged to Ramaji the mother of plaintiff and defendant. Therefore on her death the property devolved on her children. During the pendency of the suit the son died. Before the case was decided by the court the Hindu Succession Amendment Act, 2005 was passed. The other questions decided by the court in this case are –

- whether a suit for partition at the instance of a daughter could be defeated by invoking Section 23 of Hindu Succession Act, 1956 by the legal representative of a deceased son of the intestate?

- whether section 23 would be applicable in a case where the deceased intestate has left behind him only one male issue and whether it is necessary that there must be more than one male issues to invoke section 23?
• whether the protection in favour of the male heir under section 23 of the Act of 1956 would be available if he inducts a third party in the dwelling house or any portion thereof?

Though these entire questions are dealt in this case but after the passing of the Amendment of 2005 these questions have lost their significance because of the omission section 23 of Hindu Succession Act, 1956. Therefore there is no need to discuss what are the answers of these questions.

Now come to the first question, about which the court held that the effect of such omission would be retroactive The Hindu Succession Amendment Act, 2005 was enacted on the basis of the 174 report of Law Commission. The representation made by the various women's organization was considered by the Law Commission. Even at, the time when the Hindu Succession Amendment Act, 1956 was enacted, women's organizations has voiced the grievance. Though the 1956 Act made commendable improvements in reads into the erstwhile Hindu system of inheritance. But still the gender discrimination against women was not fully done away by the Act, 1956. Still the gender discrimination against women was not fully done away by the (amendment) Act of 2005. Since Section 14 of Hindu Succession Act of 1956 was not changed so it still creates great anomalies.

In this instant case the son die during the pendency of the case. Now the question arises whether the legal heir of the deceased has any right to resist partition under the provision of section 23 of
the Act, 1956 or whether it is a transferable or heritable right? It is a settled law that the right of male heirs to resist the partition is personal to him. It is neither transferable nor heritable therefore it is available only till their death. Thus it can not be said that cessation of such personal right during the pendency of a suit for partition would not entitle the female heir to claim partition taking note of subsequent events, if the contention that the state of affairs as on the date of the suit alone would be relevant, is to accepted, then it would have the effect of indirectly holding that the personal right of the male heir to resist partition could be continued by his legal representatives. Therefore whenever the personal right of a male heir under section 23 comes to an end the right of the female heir to claim partition cannot be defeated. In other words a defeasible right of a male heir would got defeated the moment his personal right ceases. Such personal right of the male heir has been taken away by the omission of section 23 of the Act of 1956 by the Amendment Act of 2005. The effect of such omission would be retrospective.

It is submitted that the Kerala High Court has taken a diligent steps for the implementation of the new Act of 2005 and tries to give flesh and breath to the Act.

On the basis of above discussion, it can be concluded, that in the field of woman's property right, the judiciary has played a very creative role. The rights of Hindu female to property passes through a long channel of judicial activism and now reached at its peak by giving the daughter equal rights of inheritance. The legislature just given a skeleton and judiciary will give the flesh, blood and soul to
that enactment. It is not important that how much enactment has been passed for the empowerment of woman but it is more important that how they are implemented.

**Christian Law**

In some countries, there are special courts for family matters, set up in pursuit of religious, political or social objectives. These include the Christians, Muslims, and Jewish ecclesiastical courts. In some other countries, there is also a fashion, to establish social courts, (another name of family courts) to deal with the legal problems, affecting families. In these courts, it is argued that judges should be given wide discretion in family cases. This seems to have been done in the family codes of Eastern Europe and the Peoples Republic of China, which are loosely constructed with statement of politics, legal principles and leave much leeway to the judges or conciliator. But against this contention, it is argued that such discretion would tend to turn tribunals into courts of morals, in which the personal views of judges could prevail, in the absence of applicable legal rules.  

The Supreme Court of India, in *Krishna Singh v Mathura*, opined, that in process of applying the personal law of the parties, the judges of the High Court, should not introduce their own concept of modernity. In view of Supreme Court the constitution maintained the position of personal law status quo. So far as the Christian law in India, is concerned their own laws governed the Christian before the

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¹⁵⁸ Encyclopedia Britanica Vol. V p. 82 (Family Law)

British period, as Muslim rulers did not interfere, in the matter of personal law of any religious community. Similarly Hindus, Muslims, Sikhs, Christians and Parsis were the subject of their own personal laws, especially with the matters relating to the family laws.

**In Pre-Independence Period**

During the regime of Britishers in India, except Hindus and Muslims, all other classes of persons were made the subject of English Common Law. By the Act of 1781 only Hindus and Muslim's personal laws were reserved. The position of the application of common law to Christians, Parsis etc. was clarified by the Supreme Court in 1844. In *Gradiner v Fell*, it was held by the court of Chancery in England that the descent of lands in the Mofassil of a British subject was governed by the common law.

In fact the early British administrator had no conscious intention to deprive the people of various religion from the benefit of their own peculiar system of laws, but they have little acquaintance about them till the first judicial plan was introduced.

Later on, the position was changed, and a provision was, therefore, made for applying customs of the country and the 'law of the defendant' to various classes of people. In *Durand v Boilard*, the Calcutta Sadar Adalat decided a question of succession amongst the French in accordance with the French law. A question of a succession of the property of a Portuguese was held to be decide by

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160 Ind. Dec. (O.S.) l, 92.
161 I.M.I.A. 299.
their own customs and usages. In Aviatick Ter Stephensons v Khaja Michael Aratoon, it was held that the inheritance of an American was governed by the American law.

In case of Anglo-Indians, no law had been prescribed and their matters were decided on the basis of justice, equity and good conscience. These Anglo Indians were also governed by the principle of English law.

In the leading case of Abraham v Abraham, Privy Council had made clear the position of native Christians. In this case the question, before the court, was whether the inheritance of these Anglo Indians be governed, by rules of old religion or there would be any other law applicable to these people? The facts of the case were that a Christian died, whose ancestors had been Hindu leaving behind an Anglo Indian wife and children. The question, before the court, was that the separate property of the deceased be the subject of which law? The Madras Adalat held, that Hindu law of coparcenary is applicable but on appeal the Privy Council reversed the decision of Madras Adalat. The Christians were not the subject of single law. The court had to decide the question of law applicable to a particular case in a particular circumstance that prolonged the litigation, and create a great chaos and dissatisfaction among the converts.

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165 Barlow v Orde 13 M.I.A. 227.
166 I.M.I.A. 240.
167 Native Christian are those whose ancestors are either Hindu or Muslim and converted to Christianity.
168 Jain M.P. : op cit, p. 455.
On the recommendation of first law commission the English law was held to be applicable to all other than Hindus, Muslims and Parsis. To secure the forfeiture of property on a Hindu or Muslim converts into Christianity, the Caste Disabilities Removal Act, 1850 was passed. The Indian Succession Act of 1865 was passed amongst much hue and cry, which was the first piece of substantive law enacted for India.\(^{169}\) Under this Act limited property rights were given to the Christians, Parsis and Jews women to remove the traditional disabilities of married woman under the law of these religion. "The Married Women Right to Property Act, 1874 was passed. After that the Indian Succession Act, 1925 was passed which gave the women equal rights of inheritance as compared to their male counterpart.

**In Post Independence Period**

In post Independence India the courts were very liberal towards the women's property rights of females and adopted a progressive attitude in matter of gender justice. In *Nepah Bela v Sita Kanta*,\(^{170}\) the court held that a Christian who had converted from Hindu died leaving behind a Christian widow and a Hindu brother and sister. The inheritance, according to the court, between them would be as the half property would go to widow and the other half would be inherited by the Hindu brother and sister collectively. Both of them would be entitled to equal share. This decision seems to be biased against the Christian widow.

\(^{169}\) Ibid.

\(^{170}\) 15 CWN 158; See also Benoy Kumar v Panchan (1956) Cal. 177.
But in 1964, in *Siril Christian v Mangamura*, the Assam High Court made it clear that the Succession Act, 1925, did not concern itself with the religion of the claimant. For succession although the religion of the deceased plays an important role and indeed it is almost the determining factor in the matter of applicability or otherwise of the rule of succession laid down in the Act to a particular case. This distinction in the nature of character of the relevant estate depending upon the religion of the deceased owner runs through the Act. But stress was here laid in the matter of its devolution upon the religion of the heir or the inheritor and that the religion of the claimant as disguised from the religion of the deceased owner, was entirely irrelevant for the purpose. A Christian died intestate and his nearest heir being Hindu, inherited the estate of the deceased.

Some times very contradictory opinion were given by the different High Courts as in *Administrator General v Ananda Chari*, the Madras High Court held that where a Hindu married with a Hindu girl and afterwards converted to Christianity, where upon the Hindu wife refuses to live with him and renounces all claims to his estate. She was not entitled to her share as a widow.

On the other hand in *Smt. Shephali Chetterji & others v Smt. Kamala Benerji*, the Allahabad High Court interpret, the term ‘widow’ as ‘widows’ and said that singular should include the plural. On the death of the husband both the widow and their lineal

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171 AIR (1964) Assam 59.
172 9 Mad. 466.
173 AIR (1972) All 531.
descendants were, held entitle to inherit the property. In Rutland v Rutland, the stepmother was not included with in the meaning of mother and she was also not kindered of the intestate, so she was not held entitled to inherit.

Sometimes in favouring the female the courts unconsciously had done injustice with others for instance, in the case of Mathew Jacob v Seleistine Jacob, The facts of the case were, that a Christian intestate Jacob Massey was survived by his one widow and five children. After the death of her first wife he remarried with another lady, from whom he had two children. He already had three children from his first wife. Seleistine’s widow claimed the whole property on the basis of an unregistered will executed by Jacob Massey. The validity of the will was challenged by the children of both wives on the basis of the exclusion of the natural heirs. But Usha Mehra J, upheld the validity of the will and stated that there was nothing unnatural in that will because the wishes of the testator were to protect the interest of his wife. The court relied in this case on the decision of Supreme Court in Rabindra Nath Mukherji v Pan Chanam Benerji.

The Indian Succession Act, 1925 did not govern the State of Travancore and Cochin till, 1951, which was extended by the State laws Act of 1951. By this extension the Christian females of the state of Travancore and Cochin got the right to inherit the property equally.

174 2 P. Wms. 216.


with their brother. Before 1951, Travancore Christian Succession Act entitled the daughter’s share to Rs. 5000/- only and she was not made entitled to inherit the father’s land.

Current Position

In Land Board v Cyriac Thomas $^{177}$ a Christian died leaving behind two sons and four daughters who succeed equally. There was a provision under the Kerala Taluk Land Board that an individual cannot hold the property excess of that the specified limit of the board. If he possesses more than, the specified limit, then he will have to surrender the excess property to the government. One of his sons has cross the specified limit so that board claimed for that. But the son took the plea that the excess land belonged to his sister and they have already executed sale deed of that land. The board argued that the sister was not entitled to inherit the land, under Travancore and Cochin Christian Succession Act. So the sale deed executed by the sister was not valid. The Supreme Court, in this case upheld the decision of the Mary Roy v State of Kerala, $^{178}$ where it was held that the succession would be governed by the provision of Indian Succession Act, 1925, where the daughter has equal right and equal share to inherit and the Christian are no more the subject of Travancore and Cochin Christian Succession Act.

Recently the court in the case of John Vallamattom v Union of India gives a very landmark judgement, $^{179}$ in this case the validity of Section, 118, of Indian Succession Act of 1925, was challenged as

$^{177}$ AIR (2002) SC 3161.
$^{178}$ (1986) 2 SCC 209.
violative of Article, 14 of the Constitution. Under this section 118 a restriction is imposed on a person who has no children or wife or father or other heirs but has heirs of distant kindred, not to bequeath his property to charitable purposes. The court held this provision unconstitutional and against the faith of Christian religious belief. The court further observed that to give property for charitable purposes is an integral part of their religion.

In relation to female generally the courts lean towards the females and in favouring the females, sometime a grave injustice has been caused to other legal heirs. Like all other laws, the laws applied to Indian Christians also passed through a channel of judicial system with some sweet and sore experiences.

Parsi Law

Pre Independence Period

The process of the development of religious laws started with the Warren Hasting's Plan of 1772. The notable feature of the plan was that the suits regarding inheritance, marriage and other religious institution, would be dealt with their respective personal laws of Hindus and Muslims. But all other categories of persons like Parsis, Christians and Jews would be the subject of English law. This point was clarified by the Calcutta Supreme Court in *J.S. Jebb v C. Lefevere & Caroline*,\(^1\) where it applied the English law to the property of a Portuguese descendant situated in Calcutta. The court pointed out that there were only three system of law which were

\(^{179}\) AIR (2003) SC 2902.

\(^{180}\) Ind. Dec (O.S.) 1.92 (Indian Legal History p. 417 Jain.)
administered English, Hindu & Muslim. In *Jacob Joseph v Rowland Rowland*,\(^{181}\) and *Emin v Emin*,\(^{182}\) by a majority the court held that it had no jurisdiction to administer any other personal law except the Hindu & Muslim laws. Since the parties were not within the exception, the American inhabitant of Calcutta was dealt with English law.

The question was again arisen in case of *Musleah v Musleah*\(^{183}\) regarding the application of the law with the Jew subject. A cleavage of opinion arose in the court and this was illustrated rather forcefully. In those days of uncertainty, the difficulties of the administration of justice were that of the ascertainment of law. Justice Grant forcefully disagreed with the majority views and held that the Jewish law should be applied to the Jewish subject. But Peel C.J., agreeing with Seton J., held that the lands in question would "*descend according to the course of the English law.*" Detailing the difficulties which the Supreme Court, would have to face if justice Grant's view was accepted, he said-

"...that it should decide one law for British subjects another for Europeans not of British origin. One law for American and another for Jews and another for Parsee ...all these must be admitted to be most grave inconveniences".

The Privy Council ruled out in, 1856 that the English ecclesiastical law was not applicable to non-Christians.\(^{184}\) The effect

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\(^{181}\) Ind. Dec. (O.S.) 1, 68 (1818).

\(^{182}\) Ind. Dec. (O.S.) 1, 778; See also Sarkies v Prosonomoyee Dossee ILR 6 Cal. 794 (1818)

\(^{183}\) Ind. Dec. (O.S.) 1, 894.

\(^{184}\) Ardaseer Cursetjee v Perozebee 6 MIA 348.
of this ruling was that in the Presidency Towns, there was no forum and no law, to give relief to non-Christians (other than Hindu and Muslims) in personal cases like matrimonial and succession etc.\(^ {185}\)

Prior to 1837, the law applicable to the Parsis and their property was the subject of English Common law but with the passing of the Parsi Chattels Real Act of 1837, the Parsis of Bombay Presidency were relieved from the operation of the English law of primogeniture as regards immovable property but made them subject in all other cases of intestacy to the English Statute of Distribution, by which only 1/3 went to widow and the residue was divided equally amongst the children and their descendants.\(^ {186}\)

In 1838 Parsis made a request to the legislative council “for embracing the rights of inheritance and succession that are acknowledged by the Parsi Nation.”\(^ {187}\) But nothing appears to have been done until 1855. In 1859, the Managing committee of Parsi law Association prepare a ‘Draft Code of Inheritance, succession and other matters and presented to the Legislative Council. In 1861, a Commission was appointed who took evidence written and oral, as regards inheritance, and succession of the property between husband and wife, the Mofussil Parsis objected in toto, the right of females to inherit on the death of male Parsi and also objected to the right of married woman during covertures to hold or dispose of their separate property. These objection were overlooked and that the Parsis Intestate Succession Act, 1865, brought these changes that

\(^ {185}\) Jain M.P. op cit p. 419.
\(^ {186}\) Indian Succession Act, 1925, p. 72.
\(^ {187}\) See Sorabji Bangalies Parsis at (pp. 156-157)
the widow and the daughter of a Parsi dying intestate in Mofussil, first time got a share in the property.\textsuperscript{188}

Till 1925, the Parsis were governed by the Parsis Intestate Succession Act of 1865. After the passing of the Act of 1925 all the controversies were resolved regarding the application of law to the Christians, Parsis and Jews subject. All other controversies and objections related to the female's property rights were also come to an end. Now the judiciary had to interpret many provisions of the Acts relating to the right of Parsis females, which came before it from time to time.

In \textit{Mancherji v Mithibai},\textsuperscript{189} the judiciary had interpreted the section 5 of the Indian Succession Act of 1925. In this case an intestate Parsi died leaving behind a widow, sons, daughters, children of predeceased son and widow of another predeceased son, who had died issueless and a posthumous daughter was afterward born, to the intestate. The share, of the widow of the predeceased, son who died issueless, was in question. The court held that the widow in question was entitled to one moiety of the share, which her husband would have taken if he survived the intestate and the other moiety of the share of the predeceased son, developed on the surviving issues of the intestate including the posthumous, daughter and the children of his other predeceased son.
Post Independence Period

A very typical case of *Ersha v Jesbai*,\(^{190}\) came before the court, in which a father Ardeshir completely excluded his daughter, Jerbai and bequeathed whole property to his brother, who predeceased Ardeshir, so the bequest to him was lapsed. It was held that Ardeshir having died intestate, the estate must go according to law and Jerbai was entitled to the property.

*Shapoorji v Rustamji*,\(^{191}\) one Ratnabai died leaving behind a husband, two sons and two daughters, under the will of the father of Ratnabai, she had a vested remainder after the death of the life tenant of her mother but Ratnabai pre deceased her mother. The question, in this case, was whether the English law of freehold property in remainder applied to Parseis? It was held that the case would be governed by the Parsi law in which there was no distinction between an estate in possession and an estate in remainder.

In the case of *Hirjibhoy v Barjorji*,\(^{192}\) a Parsi intestate died leaving behind the lineal descendants in different degrees of predeceased brothers and sisters. The question was whether the estate was to be divided as per capita or per-stripes in equal share subject to the rule that each male is to take double the share of each female of same degree? It was held that the first division should be into three shares, two shares to each of the two brothers and one

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\(^{190}\) 4 Bom. 537.
\(^{191}\) 5 Bom. L.R. 252.
\(^{192}\) 22 Bom. 909.

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share to sister and the shares should be sub divided among their respective lineal descendant.\textsuperscript{193}

**Current Position**

It is quite evident from the above discussion that after the passing of Indian Succession Act, of 1925 the Parsis are governed by the statutory laws which are quite in consonance with their religion. Major Changes were brought in the Parsi intestate succession by the amendments made in 1991, in the provisions of the Indian Succession Act of 1925. These changes are so drastic that there is no need to further change and no apparent discrimination left over. The only discrimination, which one can say, is in the share of parents, which is half of each child, but if we see it in relation to the liabilities it is also not discriminatory.

\textsuperscript{193} See also Gibson v Fisher L.R. 5 Eg. 51.