SESSION 1: Intricacies in Intestate and Testamentary Succession under Personal Laws and Succession Act, 1925

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Hosted By: Sikkim Judicial Academy

Succession laws in India had their origin in religion. Thus, we find that in the late 19th century, succession was determined on the basis of customary practices and religious laws. There were, therefore, specific rules within the scheme of religious laws and texts for the devolution of proprietary rights for Hindus and Muslims. While these rules were ambiguous due to conflicting interpretations of religious texts, regional variations in practice, and synergetic influences of cultural commixture, the fact still remained that there were specific criteria on the basis of which devolution and succession could be governed.

The term "succession" ordinarily means the transmission of the property and the transmissible rights and obligations of the deceased. The property may be ancestral or self-acquired property may devolves in two ways i.e., a) By testamentary succession i.e., the deceased died by executing will bequeathing his properties to specific heirs and b) By intestate succession when the deceased died intestate without executing Will or any deeds. The transmission could either be by way of a will or by the operation of law. Every law of succession defines the rule of distribution of property in case a person dies without making any Will. The property of the deceased person devolves upon the heirs. The law on testate succession is governed by the Indian Succession Act, 1925 for all communities except Muslims. However, certain sections of this Act are applicable to testamentary succession by Muslims also. The law in relation to making of wills by Muslims is governed by the relevant Muslim Shariat Law as applicable to the Shias and the Sunnis. The law on intestate succession for different communities in India is as under:

For Hindus, Sikhs, Buddhists and Jains: Hindu Succession Act, 1956
For Muslims: Muslim Law (which is not codified and is different for Shias and for Sunnis)
For Christians, Parsis, Jews and any community other than Hindus, Muslims, Sikhs, Buddhists and Jains: Indian Succession Act, 1925.

Historical Background

A considerable uncertainty prevailed in the period before 1865 about the law applicable in case of persons belonging to communities other than Hindus and Muslims. Before 1865, the Hindus and Muslims were governed by their respective personal laws, in matters of inheritance and succession. But the position was obscure in relation to other persons – for example, Anglo-Indians, Parsis, Jews, Armenians, Christians, and others. In general, the English law was applied in the Presidency towns, but the position as regards the Moffusil was not very clear. It is this prevalence of obscurity that was in fact, referred to by Sir Henry Maine, while introducing the Bill that led to the Succession Act of 1865. The law defining the rights and obligations of non-Hindus and non-Muslims was thus in extremely confused position. In the Presidency towns, the English Law was applied to members of just mentioned communities. Outside the presidency towns, most of the courts in the Mofussil came to apply under the phrase “Justice, equity and good conscience” in all cases not provided for by the legislature, the substantive personal law of the particular person. The First Law Commission in 1835, thus recommended that the English Law should be declared to be the law applicable to such persons – a recommendation that was not accepted. The Second Law Commission of 1853 did not favour introduction of English Law, but it viewed it desirable to assimilate law as was prevailing throughout the country. However, the Third Law Commission submitted draft of the Indian Succession Act, 1865. Finally, came the Act of 1865. The Act, dealt with succession, both testamentary and intestate. The Act exempted Hindus and Muslims from its scope, but the utility of the Act lay in the codification of law of succession as regards other persons.

The Indian Succession Act, 1865 that was based on English law and was declared to constitute, subject to certain exceptions, the law of British India applicable to all classes of intestate and testamentary succession but the exceptions were so wide as to exclude all natives of India. A very important change was made by the Hindu Wills Act, 1870 (Act 21 of 1870), which inter alia enacted that certain portions of Indian Succession Act should apply to all Wills and codicils made by any Hindu on or after 1st day of September, 1870.

The Probate and Administration Act 5 of 1881 was applied to Hindus and Muhammadans. [On the coming into force of the Hindu Succession Act, 1956, succession to property of a Hindu is governed by its provisions except to the extent excluded by Section 5 therein. Clause(1) of Section 5 relates to succession to property of Hindus whose marriage is solemnised under the Special Marriage Act, 1954, and to the property of the issue of such marriage. Clauses (ii) and (iii) of the Section relate to impartible property held by the persons specified therein. Succession to the properties of all such persons is regulated by the Indian Succession Act, 1925.]

The British Parliament felt that in the face of such vast scatteredness and multiplicity as described above there was need for consolidation of law. And thus mainly responding to this need that the British legislatives enacted Indian Succession Act, 1925, – primarily a consolidating Act. This Act replaced many enactments which were in force at that time dealing with intestate and testamentary succession including the Indian succession Act, 1865. This Act is applicable to intestate and testamentary succession.

Salient Features of Indian Succession Act, 1925:

•The Indian Succession Act, 1925 broadly divides succession into intestate and testamentary succession.

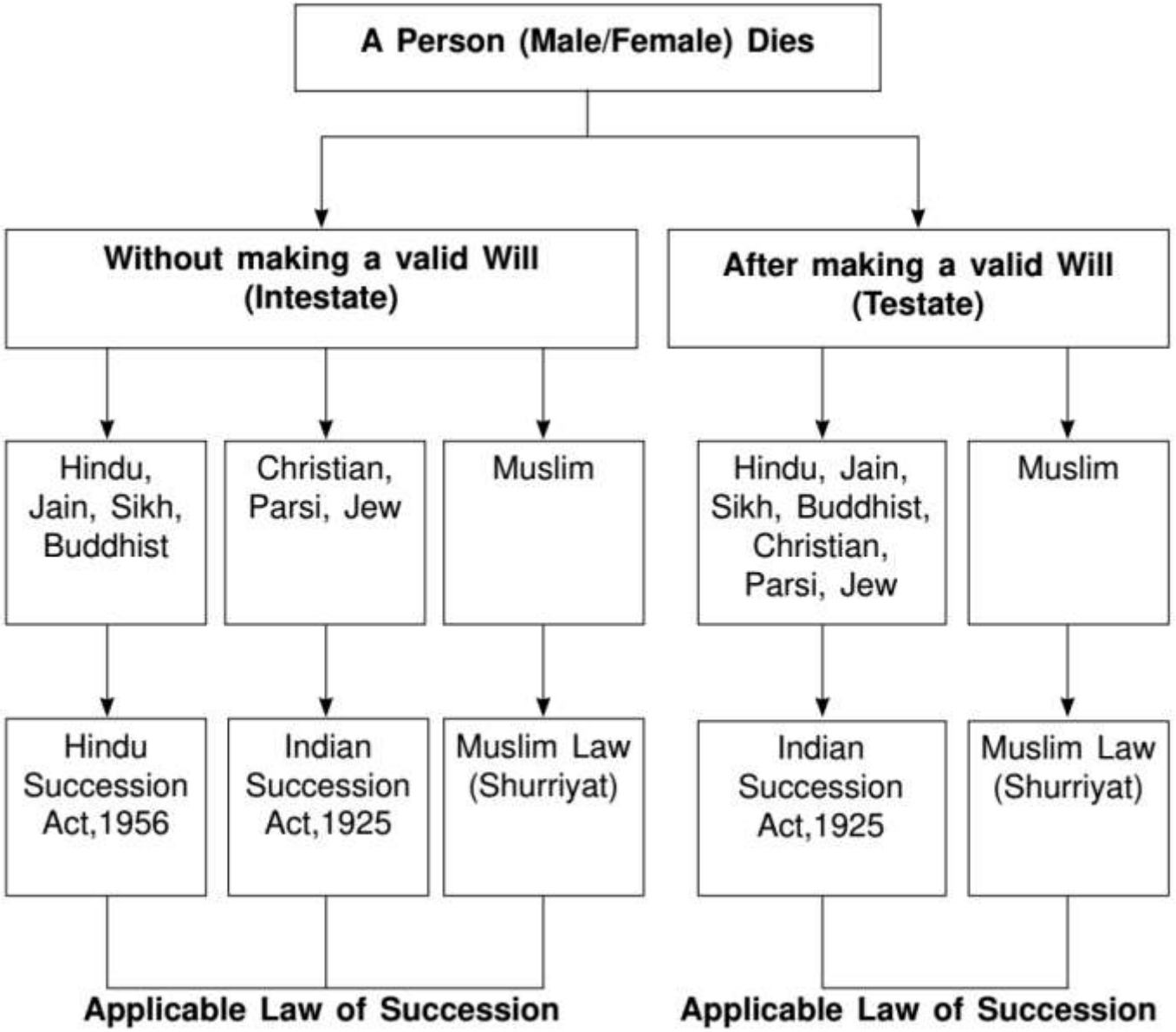
•The Act is the principal legislative measure in India dealing with the substantive law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindus and Muslims.

•This Act is a consolidating Act. It is only an amending Act and has only consolidated several pre-existing Central Acts passed between 1841 and 1903 without introducing any material changes

•The Act consolidated following Acts:

- The Succession (Property Protection) Act, 19 of 1841
- The Indian Succession Act, 10 of 1925
- The Parsi Intestate Succession Act, 21 of 1865
- The Hindu Wills Act, 21 of 1870
- The Married Women's Property Act, 3 of the 1874, Section 2
- Probate and Administration Act, 5 of 1881; Act 6 of 1889; Act 2 of 1890 and Act 8 of 1903
- The District Delegates Act, 6 of 1881
- The Succession Certificate Act, 7 of 1889
- The Native Christian Administration of Estates Act, 7 of 1901

•The Act consists of 11 parts, 391 sections and 7 schedules.


A Person (Male/Female) Dies
Without making a valid Will (Intestate)
After making a valid Will (Testate)
Hindu, Jain, Sikh, Buddhist
Christian, Parsi, Jew
Muslim
Hindu, Jain, Sikh, Buddhist, Christian, Parsi, Jew
Muslim
Hindu Succession Act,1956
Indian Succession Act,1925
Muslim Law (Shurriyat)
Indian Succession Act,1925
Muslim Law (Shurriyat)
Applicable Law of Succession
Applicable Law of Succession

Intestate Succession

'Intestate succession' occurs when the deceased does not leave a will in respect of their assets.

As explained above, the rules of intestate succession vary based on the personal law applicable to the deceased, which is based on the deceased's religion. For Hindus, Jains, Buddhists and Sikhs, the rules set out in the Hindu Succession Act 1956 (HSA) apply. For Muslims, the law is uncodified and is based on principles of *Sharia,* which are further divided into rules applicable to various sects and subsects. For instance, rules applicable to Sunnis may differ from those applicable to Shias, and even among Shias, the rules applicable to Bohris may differ from those applicable to Cutchi Memons.

The Indian Succession Act 1925 (ISA) applies to both Christians and Parsis – however, the relevant rules for Christians are contained in Chapter II of Part V, whereas the relevant rules for Parsis are contained in Chapter III of Part V.

The below table sets out an example of how inheritance varies. It compares the legal heirs of a person passing away intestate with surviving parents and a spouse but no children or siblings, according to their religion at the time of demise.

Religion of deceased	Heirs if deceased is male	Heirs if deceased is femal
• Hinduism • Jainism • Buddhism • Sikhism	• Mother • Wife	• Husband
• Islam (Sunni)	• Father • Mother • Wife	• Father • Mother • Husband
• Christianity	• Father • Wife	• Father • Husband
• Zoroastrianism (Parsi)	• Father • Mother • Wife	• Father • Mother • Husband

Succession and Inheritance

In layman's terms, both succession and inheritance are analogous; since each of the two indicates the transmission of the property, rights, responsibility, and obligation of the deceased person to the descendant. Per contra, the subtle difference is that succession is the process by which all the properties belongs to the decedent will be dealt with i.e. who is the next successor of the estate belongs to the predeceased successor. Meanwhile, inheritance refers to all the persons who have an interest in the property.

Inheritance is never in Abeyance

This principle elucidates that no property will remain ownerless, and upon the death of the owner, the succession right will pass to the closed legal heir. Abeyance will not occur unless and until there is hope for the preferable heir. The term 'hope' connotes the birth of a much preferable legal heir, who has conceived in the mother's womb before the time of the owner's death. In such a case, the inheritance will be postponed till the birth. Withal, if once the property devolved to one person, the same cannot be divested.

Illustration: if Ram dies intestate, his nephew Krishna has vested with the property since Krishna is the preferable heir at the time of his death. Later, the closest heir, Surya was born. Here Surya is not entitled to Ram's property, as at the time of Ram's death there is no hope for Surya's birth withal the property was already vested on Krishna.

As per the principle of *'inheritance never is in abeyance'* a property always has an owner, and there can be no lapse in succession. The complexities in inheritance and succession arise only when the owner dies intestate. In order to obviate the same, the aforementioned Acts were

enacted to govern the performance of succession and inheritance takes place in respective

different communities of India. The principle also high lightened the rights of an unborn child; the same has been mentioned under section 13 of the transfer of property Act as *Infant En ventre sa*

mere is deemed to inherit the property if only if he born alive. Even in the case, where theby the government under the light of the concept, Escheat. Hence, under no circumstance, the property will be remains abeyance.

MITAKSHARA AND DAYABHAGA SCHOOL AS AN IMPORTANT SOURCE OF HINDU SUCCESSION ACT, 1956

Mitakshara and Dayabhaga schools are the two schools that govern the Hindu succession law. Mitakshara is an orthodox school whereas Dayabhaga is a reformist school. Mitakshara emerged from yajnavaklya smriti which was also the main source of Hindu succession law.

Mitakshara system was initially famous in Bengal but later ruined as it quoted the reason of not including women a the female co-parceners in the share of the property which has already been terminated by the 2005 amendment of Hindu Succession Act, 1956.

Dayabhaga gives the right to claim property only after the death of the person who was the last owner of the property and also allowed women to be the co-parceners in the share of the property. Now the difference between the two has been dissolved by the intervention of the Hindu Succession Act, 1956 which is the ultimate symbol of the principle of justice. equity, and good conscience.

The Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act have completely substituted the Mitakshara and Dayabhaga system. These two schools help India evolve from the inadequacies of the succession laws and maintain a strong structure for the same.

Hindu women have suffered a long time of injustice regarding their rights in succession and inheritance-related matters. Amendment to Sec. 4(2) of this Act gave the right to women over the agriculture property. However, this amendment has certain lacunas and loopholes as it has not explicitly mentioned the rights of women over this matter. The important case adjudicating case upon this matter is **Nirmala and Ors. v. Govt of NCT Delhi and Ors.** in which it was held that deletion of this section shall supersede of what has been mentioned in Hindu Succession act and land reform act. By the provisions of Sec. 14, all the property whether movable or immovable belonging to a female is held by her as the real owner, it may be acquired by partition, sale, or through gift deed, before this Sec. 14 did not give any power to the females to be an equal co-parceners in the property. Earlier the woman did not have any right to dispose of her property but now they can do so without any permission, it removed the red- tapism.

Sec. 6 of this act, highlights the interest in the inheritance after the death of the father which is guided by the survivorship of the other Hindu undivided family. Under this section, it propounded that under Mitakshara law, women shall have the right to become a co-parcener similar to that of a son and was also subject to the same liabilities. Rescinding Sec. 23 was also one of the good site as it barred the female to seek partition in the dwelling houses, it granted the right to inherit dwelling houses only to the unmarried females. This act contains a strong legal framework when it comes to adjudicating the laws of succession and inheritance-related matters.

This act provided women with much-awaited equality and also empowered the women. The impact of this act provided them equality and they were given rights to become the co-parceners and even allows her to be the Karta of the family, and now even a widow can have the right to be a Karta. They can also now dispose of the property. It also helped in attaining equality which has been enshrined in the constitution. The positive shortcoming of this act was seen in the case of **Ms. Vaishali Satish Ganokar & An v. Mr. Satish Kesharoo Ganokar & Ors.,**in which it was questioned whether this act was retrospective or prospective.

Hindu law:

The Hindu Succession Act of 1956

It is catch all legislation, which draws the right of inheritance and succession into its ambit. This Act severally deals with the testamentary successions as well as intestate successions and propounds the rules separately for male and female successions. As mentioned earlier, Section 2 of the Act clarified that it applies to all people belongs to Hindu, Jain, and Buddhist religion.

Regarding the types of successions, the Act states that the former will be based on the testament (will). Herein the law of inheritance has no role to play. But if the same is found unlawful, then in accordance with inheritance law, the estate devolution will be accomplished. Withal, for intestate succession, the state shall follow the same.

Prescribed rules for intestate succession:

The intricacies of intestate succession are that when someone dies intestate with having a greater number of legal heirs in the first place. Withal, possessing properties have unequal profits. In order to address this issue, the Act has prioritized the legal catena of heirs.

Classes of legal heirs	Male dies intestate (Section 8 to 13 of the Act)	Female dies intestate (Section 14 to 16 of the Act)
First claim/ class I	Mother, spouse, and children If the child has predeceased, then their spouse and children	
	Husband and children.	
Second claim/ class II (in the absence of class I heirs)	Father, siblings, sibling children and grandchildren of son/daughter.	Husband's heirs
Third claim/ class III (in the absence of class I and II heirs)	Agnates (blood relative through male lineage)	parents
Fourth claim/ class IV (in the absence of aforementioned classes of heirs)	Cognates (relatives through female lineage)	Heirs of the father
Fifth claim (if all the four classes of heirs were absent)	–	Heirs of the mother

What Happens When a Coparcener of a HUF Dies Intestate

In a Hindu Undivided Family, every male member of the male lineage is a coparcener. The Hindu inheritance laws have chalked down the rules applicable to HUF. Except for the head-of-the-family, the demise of any other coparcener will not call for an immediate settlement of succession unless another coparcener demands it. In the ancestral property, the wife of the deceased has no rights but his children have. If there is any self-acquired, separate property despite living in a HUF, the separate property will be equally divided among the wife and children.

Probation of Will

- The expression ‘Probate" is defined in section 2(f) of Indian Succession Act, 1925, and it means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.

- Probate is the judicial process whereby a will is "proved" in a court and accepted as a valid public document that is the true last testament of the deceased.

- Probate is required when an estate's assets are solely in the deceased's name. In most cases, if the deceased owned property that had no other names attached, an estate must go through probate in order to transfer the property into the name(s) of any beneficiaries

Executor

- An executor is someone named in a will, or appointed by the court, who is given the legal responsibility to take care of a deceased's remaining financial obligations, from disposing of property to paying bills and taxes.

- Main beneficiary of the Will can also be an executor.

Witness

- A witness to a will is a person who participates in the validation of a will document.
- A witness to a will is a person who participates in the validation of a will document.
- Wills under the Indian Succession Act, 1925 are required to have a minimum of two witnesses attesting the Will.
- A beneficiary can never be a witness.
- **In Hemkunwar Bai vs Sumer Singh and Ors the Supreme Court on 25.09.2019** held that the witnesses to documents such as Sale Deeds and Wills need not necessarily know what is contained in them.

About a Will

- Will can be executed in **any language** and there is no prescribed form for execution of a Will. It need **not be executed on a stamp paper.**

- A Will must be signed by the testator and his signature must be **attested by two witnesses.**

- Hindu, Christian, Buddhist, Sikh, Jain all are governed by the Indian Succession Act, 1925. All can make a Will.

- The Muslims are not governed by the Indian Succession Act, 1925, they are governed by the Muslim personal laws in India, or the Shariat law. As per the Shariat law, Muslims can bequeath only one-third of their assets through a Will.

- The Indian Succession Act, 1925 recognizes two types of wills:
  a. Privileged Will b. Unprivileged Will.

Living Will

A ***living will*** is a legal document detailing a person's desires regarding future medical treatment that an individual does or does not want in the event when he/she becomes too ill to communicate his/her wishes. This is also known as Advance Directives.

Evolution of the concept of 'Living Will' in India:

Law Commission of India (2006) in its 196th Report titled **'Medical Treatment to Terminally Ill Patients (Protection of Patients and Medical Practitioners)'**: A patient's decision to not receive medical treatment did not constitute an attempt to commit suicide **under Section 309 IPC**. Also, a doctor who obeys the instructions of a competent patient to withhold/withdraw medical treatment **does not commit a breach of professional duty**.

Aruna Shanbaug case (2011): The SC **allowed passive euthanasia** for the nurse lying in a vegetative state at a hospital in Mumbai.

S. Puttaswamy case/ the Right to Privacy case (2017): – **Article 21 includes the concept of individual dignity** and thus allows passive euthanasia.

Common Cause case (2018): The SC decided that passive euthanasia will be legally allowed henceforth in India and also laid down guidelines for living wills.

*"We declare that an adult human being having the mental capacity to take an **informed decision** has the right to refuse medical treatment including withdrawal from life-saving devices. **The right to die with dignity is a part of the right to live with dignity**."*

As per 2018 guidelines	This cumbersome process will now become easier
•A **living will** was required to be **signed by an individual** seeking euthanasia in the presence of two witnesses. •It was to be further **countersigned by a Judicial Magistrate** of First Class (JMFC). •The **treating physician** was to constitute a board comprising three expert medical practitioners, with **at least 20 years of experience.** •If the board grants permission, the will had to be forwarded to the **District Collector** for his approval. •**The Collector then forms another medical board** of three expert doctors, including the Chief District Medical Officer. •Only if this second board agreed with the hospital board's findings → the decision be forwarded to the JMFC → JMFC will visit the patient and examine whether to accord approval.	•The requirement for the Magistrate's approval has been replaced by **an intimation to the Magistrate**. •The medical board must communicate its decision **within 48 hours** (no time limit earlier). •Now a **notary or gazetted officer can sign the living** will in the presence of two witnesses instead of the Magistrate's countersign. •In case the medical boards set up by the hospital refuses permission, it will now be open to the kin to approach the **High Court** which will form a fresh medical team.

The Supreme Court (‘SC’) in 2018 delivered a historic judgment to introduce the legal framework in India as regards the Living Will. The judgment contains and prescribes comprehensive guidelines to ensure that persons of deteriorated health or terminally ill patients should be able to execute a Living Will (‘Living Will’ or ‘Advance Medical Directive’).

The concept of Living Will is of recent origin. The advance medical directive has been recognized first by Statute in the United States of America when in the year 1976, State of California passed “Natural Death Act”. The term ‘Living Will’, also known as an advance directive or advance decision, means and includes an instruction given by an individual while conscious, specifying what action should be taken in the event he/she is unable to decide due to illness or incapacity and appoints a person to take such decision on his/her behalf. It may include a directive to withdraw life support or certain eventualities.

The Supreme Court in Gian Kaur v. State of Punjab held that both euthanasia and assisted suicide are not lawful in India and thus overruled its earlier decision titled P. Rathinam v. Union of India. On the contrary, in ‘Aruna Shanbaug Case’, passive euthanasia was recognized and the SC observed that even if a decision is taken to withdraw life support, such a decision should be bona fide and in the best interest of the patient and shall be approved by the concerned High Court. In the present case, SC also recommended to Parliament to consider deletion of Section 309 from the Indian Penal Code.

The Mental Healthcare Act, 2017 (‘Mental Healthcare Act’) allows the person suffering from mental illness to specify the form of treatment to be provided in advance and also empowers that person to nominate a representative to ensure that directives are being adhered to. These directives are binding in nature. The Mental Healthcare Act also lays down provisions to revoke, amend or cancel the advance directive at any time. The directions laid down in the ‘Common Cause Judgment’ act as the guiding force in the absence of any statute governing and regulating the Advance Medical Directive.

Key findings of the Judgment are as follows:

- Who can execute a Living Will –An adult with a sound mind capable of communicating his/her decision clearly.
- Prescribed Mode of Registration of a Living Will –The Living Will shall be in writing. It shall be signed in presence of 2 independent attesting witnesses by the Executor of the Living Will (‘Executor’). It shall be countersigned by the jurisdictional Judicial Magistrate of First Class (JMFC). The JMFC is under an obligation to supply the requisite copies of the Living Will to the concerned authorities and to inform the immediate family members of the Executor.

Contents of a living will –The Living Will should clearly stipulate Executor's wishes and his apparent intent for resorting to such measures. It should mention that the Executor may revoke the instructions at any time for any rationale whatsoever by informing the same to the agent and the treating physician. It is primary to disclose that the executor has understood the consequences of executing such a directive. Further, it should also specify the name of a guardian or close relative who, in the event of the Executor becoming incapable of deciding at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.

How Does a Living Will Become Operational –

i. The physician of the Executor after ascertaining the genuineness of the Living Will shall inform the Executor or his guardian /close relative inter alia, about the details of the illness and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.

ii. The hospital where the Executor has been admitted shall constitute a Medical Board to form an opinion whether to certify the instructions regarding withdrawal or refusal of further medical treatment. In the event the Hospital Medical Board certifies the instructions, the hospital shall forthwith inform the jurisdictional Collector about the proposal who shall then constitute its own Medical Board. This Board jointly visits the hospital and if they concur with the decision of the previous Medical Board, they may endorse the certificate to carry out the instructions given in the Living Will. The Chairman of the Medical Board shall convey the decision of the Board to the jurisdictional JMFC. Thereafter, the JMFC shall visit the patient and, after examining all aspects, authorise the implementation of the decision of the Board. In case the life support is withdrawn, the same shall be intimated by the Magistrate to the High Court and the High Court shall maintain the requisite records in digital format.

However, if there is a difference of opinion between the Board and the Executor or his family members, the parties can prefer a writ petition in the concerned High Court. The decision of the High Court in this regard shall be final and binding.

Making of a Will is important …Why?

- If a person die without executing a Will (intestate), there are laws of inheritance which directs, how the deceased's assets are to be distributed. And when this is happen, law chooses your beneficiaries, the administration of estate and the guardian of your minor children, and divides the money and property amongst heirs often contrary to your intention, which has not been expressed.

- There may be cases where both the parents may die in some tragic accident. If in such circumstances, no guardian has been appointed, the court may appoint one who would not be your first choice.

- In order to avoid the choice of for the guardian if your minor child/children, you can name your choice in your will to act as a guardian.

The Different Restrictions on a Valid Will

A gift cannot be made to a person who is dead at the time of the death of the testator. Section 113 of the Indian Succession act also provides for the transfer of property under a will to an unborn person. The precondition for such a transfer is that an earlier interest in life must have been created in another person and the legacy must include the entire remaining interest of the testator. In *Girish Dutt v. Datadin*[27], the apex court decided that interest to be transferred to unborn person must be absolute and not fettered in any way for that would make the transfer void.

Section 114 of the act states that no bequest is valid where the vesting of the property bequeathed is delayed beyond the life of one or more persons living at the time of the testator's death and the minority of the same person who shall be in existence at the expiration of that period, and to whom the thing bequeathed is to belong if he attains full age. This is known as a **rule against perpetuity** and provides that the property cannot be secured for an indefinite period.

The rule is based on the considerations of public policy which dictate that property is not to be made inalienable unless it is in the interest of the community at large. In the case of *Stanely v. Leigh*,[28] it was laid down that for the rule of perpetuity to be inapplicable, four conditions have to be satisfied; *firstly*, there has to be a transfer; *Secondly*, an interest in an unborn person has to be created *thirdly*, such interest must take effect after the life time of one or more persons and during minority; *lastly*, the unborn person in question should be in existence at the time of expiration of the interest

Another restriction lies in the scenario where transfer has to be made to a class; some of whom may come under the above-mentioned rules concerning unborn persons or that against perpetuity. Such bequest is rendered void according to Section 115 of the act in regard to those persons only and not in regard to the whole class.

Section 61 of the act provides for an **invalid will** which means a will which has been caused to be made by fraud or coercion and not by free will, and it has been declared void and is to be set aside. Section 127 of the

Muslim Law of inheritance

The discharge of succession and inheritance activities of a Muslim will come under the ambit of this Act. The same has been enrooted from the Shia law of succession and Hanafi succession law, which applies to the Sunnis and Shias. The sources of Muslim succession law include the holy Quran, Ijma, and Qiya. Since under Muslim law, there is no distinction between movable and immovable properties. Such properties will be considered as a combined property of the deceased owner, and the same is inheritable.

The Act mandates that the heir can inherit the decedent's property only after paying the funeral expenses in conjunction with clearing all other debts. Islamic law prohibits the birthright of inheritance. Per contra, only after the death of a person, his heirs can claim the inheritance. Alike Hindu succession law, in Islamic law, testamentary succession takes place as per the will. Concerning intestate succession, the rules have been mentioned in the Act.

The Islamic Law of inheritance is a combination of the pre-Islamic customs and the rules introduced by the Prophet. Whatever is left after the death of a Muslim is his heritable property. This property can be movable or immovable and ancestral or self-acquired. The estate of a deceased Muslim devolves on his heirs separately and the heirs are entitled to hold the property as tenants-in-common, each having a definite share in the property.

In ***Abdul Raheem vs. Land Acquisition Officer***, AIR 1989 AP 318, it was held that the joint system family or joint property is unknown to Muslim law and therefore the right, title and interest in the land held by the person stands extinguished and stands vested in other persons.

RULES OF INHERITANCE OF PROPERTY

The general rule of inheritance states that the inheritance opens on the death of the person. Nobody can claim any right in the property even if he is an heir. Any child born into a Muslim family does not get his right to property on his birth. If an heir lives even after the death of the ancestor, he becomes a legal heir and is therefore entitled to a share in property.

Rule of Representation

Doctrine of representation states that if during the lifetime of an ancestor, any of his or her legal heirs die, but the latter's heirs still survive, then such heirs shall become entitled to a share in the property as now they shall be representing their immediate generation.

Doctrine of Representation finds its recognition in the Roman, English and Hindu laws of inheritance. However, this doctrine of representation does not find its place in the Muslim law of inheritance.

Rule of Distribution

Vesting of property takes place immediately on the death of the propositus. Under the Muslim law, distribution of property can be made in two ways, firstly per capita or per strip distribution. Per – Capita distribution method is majorly used in the Sunni law. According to this method, the estate left over by the ancestors gets equally distributed among the heirs. Therefore, the share of each person depends on the number of heirs. The heir does not represent the branch from which he inherits.

On the other hand, per strip distribution method is recognised in the Shia law. According to this method of property inheritance, the property gets distributed among the heirs according to the strip they belong to. Hence the quantum of their inheritance also depends upon the branch and the number of persons that belong to the branch. It is noteworthy that the Shia law recognises the principle of representation for a limited purpose of calculating the extent of the share of each person. Moreover, under the Shia law, this rule is applicable for determining the quantum of the share of the descendants of a pre-deceased daughter, pre-deceased brother, pre- deceased sister or that of a pre-deceased aunt.

GROUNDS OF DISQUALIFICATIONS

Disqualifications which debar the heirs to succeed the property of the intestate are—

•**MURDERER**

Under the Sunni Law, a person who has caused the death of another, whether intentionally, or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

Homicide under the Shia Law is not a bar to succession unless the death was caused intentionally.

•ILLEGITIMATE CHILDREN

Under the Hanafi School, an illegitimate child is not entitled to inherit. Such a child cannot inherit from his/her father but can inherit from his/her mother and all relatives of the mother. The mother can also inherit the property of her illegitimate children.

•WIDOW

Under Muslim law, no widow is excluded from the succession. A childless Muslim widow is entitled to one-fourth of the property of the deceased husband, after meeting his funeral and legal expenses and debts. However, a widow who has children or grandchildren is entitled to one-eighth of the deceased husband's property.

In Abdul Hammed Khan vs. Peare Mirza, 1935 I.L.R. 10 Luck. 550 it was held that a childless widow, in the absence of other heirs, was entitled to inherit her share and rest of the property including the land, of her husband by the application of the doctrine of return.

•CHILD IN THE WOMB

A child in the womb of its mother is competent to inherit only if it is born alive. A child in embryo is regarded as a living person and, as such, the property vests immediately in that child. But, if such a child in the womb is not born alive, the share already vested in it is divested and, it is presumed as if there was no such heir (in the womb) at all.

•ESCHEAT

Where a deceased Muslim has no legal heir under Muslim law, his properties are inherited by Government through the process of escheat.

•DIFFERENCE OF RELIGION

A non-Muslim could not inherit from a Muslim but the Caste Disabilities Removal Act of 1850 does away in India with the exclusion of a non-Muslim from the inheritance of the property.

Table of shares – Sunni Law

Sharers	Normal Share		Condition under which the normal share is inherited	This column sets out (A) Shares of Sharers Nos:3, 4, 5, 8 and 12 as varied by special circumstances; (A) Conditions under which sharers Nos:1, 2, 7, 8, 11 and 12 succeed as Residuaries
	Of one	Of Two or more collectively		
1. FATHER	1/6		When there is a child or child of a son	[When there is no child or child of a son the father inherits as a residuary]
2.TRUE GRANDFATHER	1/6		When there is a child or child of a son and no father or nearer true grandfather.	[When there is no child or child of a son. the Tr.G.F. inherits as a residuary provided there is no father or nearer Tr.G.F.]
3. HUSBAND	¼		When there is a child or child of a son	½ when no child or child of a son.
4. WIFE	1/8	1/8	When there is a child or child of a son.	¼ when no child or child of a son.
5. MOTHER	1/6		(a) When there is a child or child of a son. or (a) When there are two or more brothers or sister, or even one brother and one sister, whether full consanguine or uterine	1/3 when no child or child of a son. and not more than one brother or sister (if any); but if there is also a wife or husband and the father, then only 1/3 of what remains after deducting the wife's or husband's share.
6. TRUE GRANDMOTHER	1/6	1/6	(a) Maternal – when no mother, and no nearer true grandmother either paternal or maternal. Paternal – when no (a) mother, no father no nearer true grandmother either paternal or maternal, and immediate true	

			grandmother.	
7. DAUGHTER	½	⅔	When no son	[With the son she becomes a residuary]
8. SON'S DAUGHTER h.l.s. [Sec.62 cl. (a)]	½	2/3	When no (1) son, (2) daughter, (3) higher son's son (4) higher son's daughter or (5) equal son's son	When there is only one daughter or higher son's daughter but no(1) son, (2) higher son's son, (3) equal son's son, the daughter or higher son's daughter will take ½ and the son's daughter h.l.s. (whether one or more) will take 1/6 i.e. 2/3 – ½] [with an equal son's son she becomes a residuary] When there is only one daughter the son's son daughter (whether one or more) will take 1/6, if there be no son or son's son. (With the son's son she becomes a residuary)
e.g. (i)Son's Daughter	½	2/3	When no(1) son, (2) daughter; or (3) son's son	When there is only one daughter or the son's daughter, the son's son's daughter (whether one or more) will take 1/6, if there be no (1) son, (2) son's son, or son's son's son (With the son's son's son she becomes a residuary]
(ii) Son's son's daughter	½	2/3	When no(1) son, (2) daughter; or (3) son's son, (4) son's daughter, or (5) son's son's	
9. UTRINE BROTHER or 10. SISTER	1/6	1/3	When no(1) child, (2) child of a son h.l.s (3) father of (4) True grandfather	
11. FULL SISTER	½	2/3	When no(1) child, (2) child of a son h.l.s (3) father of (4) True grandfather, or (5) full brother	[With the full brother she becomes a residuary]
12. CONSANGUINE SISTER	½	2/3	When no(1) child, (2) child of a son h.l.s (3) father of (4) True grandfather, or (5) full brother, (6) full sister, or (7) consanguine brother	But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance. [With the consanguine brother she becomes a residuary]

Table of sharers – Shia Law

Sharers	Normal Share		Conditions under which the share is inherited	Share as varied by special circumstances
	Of one	Of two or more collectively		
1. Husband	¼		Whether there is a lineal descendant	½ when no such descendant
2. Wife	1/8	1/8	Whether there is a lineal descendant	¼ when no such descendant
3. Father	1/6		Whether there is a lineal descendant	[If there is no lineal descendant the father inherits as a residuary]
4. Mother	1/6		(a) When there is a lineal descendant: or (a) When there are two or more full or consanguine brothers, or one such brother and two such sisters or four such sister, with the father.	
5. Daughters	½	2/3	When no son	[With the son she takes as residuary]
6. Uterine Brother or 7. Sister	1/6	1/3	When no parent or lineal descendant	[With the son she takes as residuary]
8. Full sister	½	2/3	When no parent or lineal descendant or full brother or father's father	[The full sister takes as a residuary with the full brother and also with the father's father.
9. Consanguine Sister	½	2/3	When no parent or lineal descendant or full brother or sister or consanguine brother or father's father.	[The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.

Christian Law Of Succession

The Christian Law of Succession is governed by the provisions in the Indian Succession Act, 1925. However, with respect to Indian Christians, the diversity in inheritance laws is greatly intensified by making domicile a criterion for determining the application of laws. However, Protestant and Tamil Christians, for example, living in certain taluks, are still governed by their respective customary laws. Christians in the State of Goa and the Union Territories of Daman and Diu are governed by the Portuguese Civil Code, 1867, while those in Pondicherry could be governed by the French Civil Code, 1804 (such Christians are known as "Renocants"), customary Hindu law, or the Indian Succession Act.

This Act recognises three types of heirs for Christians: the spouse, the lineal descendants, and the kindred.

Basic Principles Of The Christian Law Of Succession

The Concept Of Succession

Before venturing into a discussion on the Christian Law of Succession, we would do well to first make a preliminary study of what exactly succession is. Succession, in brief, deals with how the property of a deceased person devolves on his heirs. This property may be ancestral or self- acquired, and may devolve in two ways:

1. By Testamentary Succession, i.e. when the deceased has left a will bequeathing his property to specific heirs
2. By Intestate Succession, i.e. when the deceased has not left a will, whereby the law governing the deceased (according to his religion) steps in, and determines how his estate will devolve.

S. 2(d) of the Act defines an “Indian Christian” hereby: “Indian Christian” means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion.

This was further clarified in the case of Abraham v. Abraham where the scope of this definition of an ‘Indian Christian' was delineated with regard to its actual working. This case laid down that a Hindu who has converted to Christianity shall not be governed by Hindu law (customary or otherwise) anymore, and any continuing obligatory force that the Hindu law may have exercised upon him stands renounced. However, he was clearly given the option to permit the old law to continue to have an effect on him, despite having converted out of the old religion into the new one.

In 1865, the original Indian Succession Act was passed and a new question arose as to whether, even under the provisions of this new Act, the convert could elect to be governed by the old law. In the case of **Kamawati v. Digbijoy** thereafter it was held by the Privy Council that the old law ceases to be applicable with regard to inheritance i.e. succession. Thereafter in a 2001 judgement, the Allahabad High Court reiterated that Hindu converts to Christianity will be bound solely by the succession laws governing Christians, inclusive of the Indian Succession Act, 1925, and it will not be possible for them to elect to be governed by the old law in this or related matters.

Will, however, the incidents of the joint family (in the case of those converting out of the Hindu religion) continue to apply? The Courts in this regard have not been able to reach a uniform conclusion. In the case of **Francis v. Gabri** the Bombay High Court held that if a family were to convert out of Hinduism into Christianity, the coparcenary rights of that family would remain untouched. But the Madras High Court held in the case of **Francis v. Tellis** that the effect of conversion out of Hinduism would be to render all coparcenary rights thenceforth individual rights. In this case, out of two brothers, one of them converted to Christianity. It was held that upon his death it would not be possible for the other brother to succeed to the entire estate by way of the doctrine of survivorship.

Intestate Succession Among Indian Christians

S. 30 of the Indian Succession Act, 1925 defines intestate succession thus: A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. Thus any property which has not already been bequeathed or allocated as per legal process, will, upon the death of the owner, insofar as he is an Indian Christian, devolve as per the rules contained in Chapter II of the Act. It would be worthwhile to note at this point that intestacy is either total or partial. There is a total intestacy where the deceased does not effectively dispose of any beneficial interest in any of his property by will. There is a partial intestacy where the deceased effectively disposes of some, but not all, of the beneficial interest in his property by will.

Domicile

The Domicile of the deceased plays an integral role in determining the method of devolution of his property. Halsbury defined ‘domicile' thus: “A person's domicile is that country in which he either has or is deemed by law to have his permanent home.” S.5 of the Act categorically states that succession to the movable property of the deceased will be governed by the lex loci as per where he had his domicile at the time of his death; whereas succession to his immovable property will be governed by the law of India (lex loci rei sital), no matter where he was domiciled at the time of his death. Also, S. 6 further qualifies this provision by stating that a person can have only one domicile for the purpose of succession to his movable property. It must be noted that domicile and nationality differ from each other - domicile deals with immediate residence, whereas nationality implies the original allegiance borne by the person.

S. 15 lays down that upon and during subsistence of marriage, the wife acquires the domicile of her husband automatically.

Kindred Or Consanguinity

S. 24 of the Act makes an initial reference to the concept of kindred and consanguinity, defining it as "the connection or relation of persons descended from the same stock or common ancestor." S. 25 qualifies 'lineal consanguinity' with regard to descent in a direct line. Under this head fall those relations who are descendants from one another or both from the same common ancestor. Now, succession can be either 'per capita' (one share to each heir, when they are all of the same degree of relationship) or 'per stirpes' (division according to branches when degrees of relationship are discrete). For Christians, if one were to claim through a relative who was of the same degree as the nearest kindred to the deceased, one would be deemed to stand in the shoes of such relative and claim 'per stirpes.'

S. 26 qualifies 'collateral consanguinity' as occurring when persons are descended from the same stock or common ancestor, but not in a direct line (for example, two brothers). It is interesting to note that the law for Christians does not make any distinction between relations through the father or the mother.

If the relations from the paternal and maternal sides are equally related to the intestate, they are all entitled to succeed and will take equal share among themselves. Also, no distinction is made between full-blood/half-blood/uterine relations; and a posthumous child is treated as a child who was present when the intestate died, so long as the child has been born alive and was in the womb when the intestate died.

Christian law does not recognise children born out of wedlock; it only deals with legitimate marriages. Furthermore it does not recognise polygamous marriages either. However, a decision has been made to the effect that it does recognise adoption and an adopted child is deemed to have all the rights of a child natural-born, although the law does not expressly say so.

The law of intestate succession under S. 32 states that: The property of an intestate devolves upon the wife or husband or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter. However, as aforementioned, the Act recognises three types of heirs for Christians: the spouse, the lineal descendants, and the kindred.

Rights Of The Widow And Widower

S. 33, S. 33-A, S. 34 of the Act govern succession to the widow. Together they lay down that if the deceased has left behind both a widow and lineal descendants, she will get one-third share in his estate while the remaining two-thirds will go to the latter. If no lineal descendants have been left but other kindred are alive, one-half of the estate passes to the widow and the rest to the kindred. And if no kindred are left either, the whole of the estate shall belong to his widow. Where, however, the intestate has left a widow but no lineal descendants, and the net value of his property does not exceed five thousand rupees, the whole of the property will go to the widow - but this provision does not apply to Indian Christians.

S. 35 lays down the rights of the widower of the deceased. It says quite simply that he shall have the same rights in respect of her property as she would in the event that he predeceased her (intestate).

Rights Of Children And Other Lineal Descendants

If the widow is still alive, the lineal descendants will take two-thirds of the estate; if not, they will take it in whole. Per capita (equal division of shares) applies if they stand in the same degree of relationship to the deceased. This is as per Sections 36-40 of the Act. Importantly, case law has determined that the heirs to a Christian shall take his property as tenants-in-common and not as joint tenants.

Also, the religion of the heirs will not act as estoppel with regard to succession. Even the Hindu father of a son who had converted to Christianity was held entitled to inherit from him after his death.

As per S. 48, where the intestate has left neither lineal descendant, nor parent, nor sibling, his property shall be divided equally among those of his relatives who are in the nearest degree of kin to him. If there are no heirs whatsoever to the intestate, the doctrine of escheat can be invoked by the Government, whereupon the estate of the deceased will revert to the State.

Testamentary Succession Among Indian Christians

A will is the expression by a person of wishes which he intends to take effect only at his death. In order to make a valid will, a testator must have a testamentary intention i.e. he must intend the wishes to which he gives deliberate expression to take effect only at his death.

Testamentary Succession is dealt with under Part VI of the Indian Succession Act, 1925. According to S. 59, every person of sound mind, not being a minor, may dispose of his property by will. The explanations to this Section further expand the ambit of testamentary disposition of estate by categorically stating that married women as also deaf/dumb/blind persons who are not thereby incapacitated to make a will are all entitled to disposing their property by will. Soundness of mind and freedom from intoxication or any illness that render a person incapable of knowing what he is doing are also laid down as prerequisites to the process.

Part VI of the Act encompasses 134 Sections from S. 57 to S. 191, that comprehensively deal with all issues connected with wills and codicils, and the making and enforcing of the same, including capacity to make a will, formalities needed for wills, bequests which can be validly made etc.

It has been argued by several prominent Christian lawyers and legal writers that “laws with regard to touchy issues like succession, etc. should reflect customs and practices for their acceptance and sustenance.” While the improvements introduced by the Indian Succession Act, 1925 with regard to women's property rights have been welcomed, since “the majority of Christians do not seem to be opposed to giving equal share to women in the matter of intestate succession,” there is also a faint vein of resentment with regard to the total repeal of the Travancore Christian Succession Act 1792 since it was considered to be an overall well-balanced legislation.

As these problems are still alive, it has become necessary to look for some solutions in the constitutional context. “While in view of [the] distinction between legislative and judicial functions, the legislature cannot by a bare decision, without more, directly overrule, reverse or override a judicial decision, it may at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative, or neutralising effect the conditions on which such decision is based.”