CHAPTER - III
SHARES OF FEMALES UNDER DIFFERENT LEGAL SYSTEM

An Overview

Inheritance or Succession means the devolution of property on an heir or heirs upon the death of the propositus. Every society has some kind of system, for dealing with the things or property that are in the control of the member who has died. It is quite complicated in every society. The rules and regulations which deal with the property to be distributed among the heirs differ according to the set ups, norms and values of each society.

The law of inheritance is a body of principles and regulations governing the means by which assets and liabilities may be transferred, after the death, to the heirs. The concept of inheritance depends upon a common acceptance of the notion of private ownership of goods and property. In early societies a dead man’s relics were buried with him as a ritual practice or apportioned to relations and other tribesman. The rules, governing the succession universally, depend upon the view of the deceased and the kinship as a primary consideration. Before going into detail about the law of inheritance we will have a look, how the law of inheritance has developed.

Development of Family System

The English word ‘family’ is derived from the Latin word ‘familia,’ which means ‘house hold.’ The organizations of household or families are varied from place to place. With the development of the political institutions, the family become a private place and characterized by
hierarchy, intimacy and support. In ancient Greek cities or states four level of kins grouping could be traced out, which are –

- the phratry (*phratra*)
- the aristocratic clan (*genos*)
- the kindered (*anchisties*) and
- the house hold (*oikos*).

The "phratries" were large tribal subdivisions, consisting of families claiming to common kin relation. At the apex of each "phratry", there were aristocratic clans that had certain hereditary rights such as the right to hold priestly offices. The kindered consisted of a set of relatives who can claim the inheritance. The partilineal kin groups were called the 'gens': Each 'gens' had one or more recognized chiefs. Property was inherited with in the 'gens'.

The Romans distinguished two kinds of blood relatives, agnates and cognates. Agnates were relatives through male line and reckoned to be closer, because they have the right to inherit the property and the marriage was forbidden between them. The cognates were any other blood relatives.

The ideals of Christianity, dominance of church and emergence of feudalism played an important role in shaping the medieval and post medieval families. With the spread of Christianity the close kin's marriages were forbidden and the inherited property was dispersed, which lessened the influence of kins based group. In the Middle Ages the women and

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1 Encyclopedia Britanica Vol. 6, p.317.
2 Ibid
children got rights in their own capacity independent of the head of household.

The family is considered the basic unit of the society. Islam had provided an elaborate scheme for the establishment of a systematic and sound family life.

After the very brief history of the family system and the development of the law of inheritance, we will discuss elaborately the rules governing the law of succession in different religio-legal system.

Laws of Inheritance in Different Religio-Legal System

Like all other laws, the rules governing the estate of a deceased also differs from place to place. Every system has their own rules and regulations to govern the succession suited to their socio-economic conditions.

From the opening paragraph of the Sirajiyah –

"Learn the laws of Inheritance and teach them to the people, for they are one half of the useful knowledge.”

"It is (inheritance) the most difficult subject of Hindu jurisprudence" Jimutvahana."

Colbrook said, “no branch of jurisprudence is more important than the law of succession and inheritance as it constitutes that part of any

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national system of laws which is the most peculiar and distinct and which is of most frequent use and extensive application."\footnote{Mcnaughten W.H. : Principles & Precedents of Muslim Law (preliminary remark) p. 1}

Fitz-Gerald's opinion is that, "in all system of law the doctrine of succession is, the touch stone of the lawyers, the legal mind delights in its inevitable intricacies, the layman in repelled."\footnote{Fitzgerald S.V. : Muslim Law & Abridgement, London (1931) p. 182.}

"All laws of inheritance are made up of the debris of the various forms which the family has assumed"\footnote{See Smith : op cit p. 801.}

Like all other laws the rules governing the estate of a deceased also differs from place to place. Every system has their own rules and regulations to govern the succession suited to their socio-economic conditions.

By these saying of legal luminaries it is evident that the law of succession is the most important part of any legal system as it affect the interest of all description of people and deserve special notice.

**Under Islamic Law**

Great tribute is paid to the Islamic law of Inheritance not only by Muslims but by the western world also. As Coulson says, "Jurisdictically the law of succession is a solid technical achievement and Muslim Scholars takes a justifiable pride in the mathematical precision with which the right of various heirs in any given, situation can be calculated."
William Jones “I am strongly disposed to believe that no possible question could occur on the Muslim Law of succession which might not be rapidly and correctly answered.”

Al Sirajiyyah, “Islamic Law of Inheritance in its present form is a fixed scientific and beautiful harmonious system,”

The eminent writers and jurist because of its completeness, perfectness and elaborate provisions always admire the Islamic law of Inheritance. Islamic law of Inheritance brought many reforms in the existing system of succession in pre-Islamic world. In pre Islamic days the notions of kinship were based on blood feud, which was comradeship in arms. On this basis, women and children who were unable to bear arms, disqualified in regard to inheritance. Holy Quran laid down that nothing could furnish so strong a claim to inheritance as blood relation. This provision generally strengthens the family tie.

“And they who believed and left their homes afterwards and have striven along with you, these are also of you; but those who are united by ties of blood are nearer to each other, by Book of God.”

By these Quranic injunctions, it is proved that Islam has brought a revolutionary change in the law of inheritance and gave importance to the family and relationship.

To govern the Islamic law of inheritance there is a whole Surah (Surah Nisan) in which some injunctions are given. The Islamic Law introduced some changes in the pre Islamic rules of inheritance. As

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8 Ibid p. 802
9 Quran : XXXIII, Surah Nisan
by Islam the husband, wife and cognates were made entitled to inherit. There is no need to discuss the whole Islamic law of inheritance and succession with its minute details but to understand the women’s property right it is necessary to give a brief draft of Islamic law of Inheritance.

Salient Features of Islamic Law of Inheritance

"Nemo est heirs viventis,"

Right of inheritance arises only after the death of propositus, no person is the heir of a living Muslim, the person whose property is to be distributed unless he is dead. The estate vests immediately in each heir at the moment of the death, in proportion to the share prescribed by Holy Quran.

Dual Basis of Islamic Law of Inheritance

The whole Islamic law of inheritance is based on two bases with the exception of Shia Law. First- Holy Quran, second - pre-Islamic customs and usages. The pre-Islamic customs and usages have an important place in the law of inheritance. The customs, which were not expressly abrogated by the Holy Quran, continued to prevail. The Holy Quran did not swept away all the existing laws of succession of pre-Islamic world.

10 Hasan Ali v Nazo (1889) 11 All 456.
13 Murtaza Hussain Khan v Md. Ali Khan, ILR 33 All 532 (P.C.)
The Nearer in Degree Excludes the Remoter

The preference will be decided by the nearness of the consanguinity. 14

Rule of Representation

The rule of representation is not generally recognized in Islamic law. The heir's apparent right of succession do not pass to his own heir. 15 It means the children of pre-deceased child will not represent their father or mother at the time of succession. In *Abdul Huq v Seetaram Sethi*, 16 it is said that children in Islamic family were not co-owner in the sense that what was purchased by one person was also for the benefit of another. In this case, the children of the deceased Muslim were minor at the time of his death. Their paternal uncle on their behalf had purchased some property in the name of one of the minor child. It was held no rule of representation, 17 is recognized in Islamic law, means the children of pre-deceased child will not represent their father or mother at the time of succession.

Illustration: A died leaving behind a son and a son of a predeceased son. The whole property will go to his son and the son's son will get nothing.

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15 Dakshan Chandra v Takim Dhinit AIR (1924), Cal. 558.
16 (1927) 106-I-C, 76.
Rule of Spes-Successionis

A chance of an heir, it means there will be a chance to inherit. But under Islamic law, the inheritance open on the death of a person and no birthright or rule of representation is recognized. So there is no question of mere an expectation, to be an heir because it may happen that one will not survive the other. In the life of a Muslim no one can be a heir of his property.\(^{18}\)

No Concept of Joint Family

In Muslims there is no concept of joint family. Under Islamic law the property acquired by some members will not be deemed to be the joint family property\(^{19}\) but it is not contrary to Islamic law, if a family trade is carrying on, for the benefit of all members.\(^{20}\) If the members of an Islamic family live in commensality they do not form a joint family.

No Rule of Primogeniture

The preference to eldest son in the matter of succession was given by near about all the legal system in ancient time. It is said that it was originated in the English feudal system and also prevalent among Jews.\(^{21}\) But under Islamic law there is no concept of the rule to give the entire

\(^{18}\) Tayyabji F.B.: Mohammadan Law, IIIRD ed. Sec. 382.
\(^{19}\) Abdul Samad v Biwi Jan AIR (1933) All 206, See : Also Sukrullah v Zebrsa Bibi AIR (1932), Ali 512.
\(^{20}\) Mohd Abdul Rahim v Abdul Hakim, AIR (1921) Cal. 653.
estate to the eldest son excluding the other heirs or to leave them on whims and caprice of the eldest son. Every heir shall inherit in his or her own capacity.

No Birth Right

In Muslims the children are not born with the right of property as in Hindu law. Under Islamic law there is no distinction between ancestral or self acquired property or they do not form a coparcenary in which the child has property right from his birth.

No Concept of Survivorship

Under Islamic law there is no concept of joint family, so no survivorship is recognized, which is the main characteristic of joint family of Hindu Law. The principle is unknown to Islamic law and the heirs of deceased take their share as, are tenants in common and not as joint tenants.

Rules Relating to Illegitimate Children

An illegitimate child and its father are not related in law so they are not competent to inherit from each other. An illegitimate child cannot inherit to a legitimate child born to the mother of subsequent marriage. Under Sunni law there is a provision that an illegitimate child can inherit from her mother but under Shia law he or she is not entitle to inherit from any parents. Under Hanafi law an illegitimate child also inherits from a

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22 Ram Abidi v Mirza Ahmad, AIR (1925), Oudh 190.
23 M. Khazir Bhat v Ahmad Dar AIR (1960) J & K 57, See also Ma Bi v Ma Khatun AIR (1930) Rang 72.
24 Boodhun v Jan Khan (1870) W.R. 265.
25 Rahmatullah v Maqsood Ahmad AIR (1952) All 640 at p. 641.
26 Tayyabji – op. cit. p. 819.
person to whom, it is related through its mother as distant kindered. The putative parents do not inherit from an illegitimate child under Shia Law.  

## Insanity and Unchastity

In Islamic law mental derangement is not an impediment on succession. Wife run away from her house and live in adultery, it was held that she was entitled to inherit unless she was divorced.  

## Non-Muslim Can Not be an Heir

"A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim," narrated by Usman bin Zaid. K.P. Chandrashekar Appa v Govt of Mysore, the facts of the case were, that a converted Muslim woman died, intestate leaving considerable property but have no issue. The brother of the wife who was still Hindu claimed her property as brother. It was held that brother is not entitled to succeed. A daughter, being a sole heir of a converted Muslim, was held to inherit the whole property as a heir and by way of Return. In 1947, a question before the court was whether succession and inheritance of a converted Muslim be governed by Islamic law? It was held that Islamic law applied to a Muslim not only by birth but by religion also. A converted Muslim would be governed in all matters by Islamic law as his personal law.

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27 In Bafatan v Bilaiti Khanam (1903) Cal. 683.
28 Khyratun v Amanee, ii, W.R. 212.
30 Sahih –Al-Bukhari Vol. 8
31 AIR (1953) Mys. 621.
33 Bai Khatya v Karim Bahi, AIR (1947) Guj. 4 at p. 7.
Homicide

A person, who has caused the death of another, whether intentionally or by mistake or by negligence or by accident, is not entitled to inherit the property of that deceased. Though according to Sirajiyah, the descendants of the murderer were not be excluded. Shia law excludes the murderer, only in the case of intentional murder.

Missing Person

The rule of Islamic law is that missing person must be regarded alive till lapse of 90 years from his birth, which is abrogated by the Indian Evidence Act. If the person is to be presumed alive his property cannot be distributed among his heirs, the part of the estate, which he is, entitle to be inherited kept apart.

Unborn Person as being Heir

If the female relative of the deceased is pregnant at his time of the death, the child in mother womb will be considered competent to inherit but born alive and the share kept for him or her will be the maximum.

Several Deaths at a Time

If there are several deaths among the heirs of the deceased before final distribution of his estate, the shares of different heirs must be determined on the basis of each death working out final distribution. In the leading case of Jafri Begum v Amir Mohd, the court held that the jus

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34 Kenchava v Girimallapa AIR (1924) p.c. 209
36 Tayabji - op cit p. 824.
37 Mst. Jawai v Hussain Baksh (1922) 3 Lah. 80, 67, 1C, 154.
38 (1886) 7 All 822, 834 Moola Qasim v Moola Ali AIR (1905) 32-I-A. 177-179, para 2
representation is being absolutely unknown to Islamic law of inheritance, the right of inheritance depends upon the exact time of death when the person, through whom the heir claims otherwise, died, the orders of death being the sole guide in such cases. At this time the rule that younger survive the elder will apply.

After discussing the general principles of the law of inheritance. It is inevitable to know briefly the heirs and quantum of their shares in the heritage of the deceased.

Kinds of Heirs

“To benefit everyone we have appointed heirs and shares to the property, left by partner and near relatives.”

The heirs are divided into three classes according to the order of succession.

- Sharers
- Residuaries
- Distant kindered

Sharers

The sharers are those persons who are entitled to a prescribed share of inheritance by Holy Quran. They are twelve in number, four males and eight females. These are also called the Quranic sharers, who consist of those relations, which were excluded from the inheritance, under the customary law. Though their claims on the score of priority are not inferior to them. The male sharers are father, grandfather (paternal), uterine

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39 Holy Quran IV :33
40 Tayyabji – op. cit. p. 827
brother and husband. The female sharers are wife, daughter, son’s daughter (how low so ever) full sister, consanguine sister, uterine sister, mother and grandmother (paternal and maternal). The fractional quantum of the share is also fixed by Holy Quran in Surah Nisan, which deals elaborately in different verses about the inheritance. The fixed shares are 1/2, 1/4, 1/8, 2/3, 1/3, 1/6. The ascertainment of heirs, as well as allocation of their share is decided in every case, according to the principle of the school, to which the deceased belonged at his/her death. The difference of the School of heirs will make no effect. The quantum of the share be determined at each death. The estate vests immediately in each heir at the death according to the quantum of share ordained by Holy Quran. This ownership cannot be suspended till the payment of the debt. Next to sharer the residuaries come and after that the distant kindered.

Example: If only father, mother and husband are survived, they all are sharer and the property will immediately vest in them. In this case the father will inherit as residuary because there are no children.

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\begin{align*}
\text{(Residuary)} & \quad \text{(share)} \\
\frac{2}{3} & \quad \text{of} \quad \frac{1}{2} \\
\frac{1}{6} & \quad \text{of} \quad \frac{1}{2} \\
(P) - H & \quad \frac{1}{2} \\
\text{(Sharer)}
\end{align*}
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41 Hayat-un-Nisan v Mohd (1890) 1 All 290.
42 Supra note 36.
43 Supra note 12.
44 Faiz v Abdul Jabbar, AIR (1943) Pesh, 65.
Residuaries

All those persons, whose shares are not prescribed by the Holy Quran and inherit the residue after the prescribed shares been given to the sharers, are called the residuaries. Relating to residuaries there is a Hadith of Prophet (PBUH) narrated by Abu Hurairah, “The Prophet (PBUH) of Allah (SWT) said “who are nearer to the believers than themselves and who so ever dies and leave property it is for the residuaries if no sharer.”

It means that after allotting the prescribed shares to the sharers if the property left that residue will go to residuaries. Some times if there is no sharer the residuaries inherit the whole property. If there are widow, son and daughter, after allotting the prescribed share of widow (as she is sharer) the residue will be inherited by son and daughter (as residuaries).

\[(P) - W_{1/8}\]
\[S_{1(7/12)}\]
\[D_{1(7/24)}\]
(residuaries)
(residuaries)

According to Sirajiyyah there are three types of residuaries –

- Residuary in their own right
- Residuary in another right
- Residuary together with another

\[45\text{ Sahih Bukhari Vol.8, translated by M.M. Khan, chapter 5, Tr. No. 2309.}\]
Residuaries in their own Rights

Those, who are related with the deceased without the intervention of the females, are said to be the residuaries in their own rights. They are four and all are males.

- Deceased's descendants (hls)
- Deceased's ascendants (hhs)
- Deceased's father's descendants (hls)
- Deceased's grand father's descendants (hls)

Residuaries in Another Right

The residuary, in another right is every female who becomes or is made a residuary by the presence of a male, who is parallel to her. These are four females:

Daughter with son,

- Daughter with son.
- Son’s daughter with son’s son
- Full sister with full brother
- A half sister with father and half brother

Residuaries together with Another

The residuary with another is every female who becomes a residuary with another female; as full sisters or half sisters by father, who become residuaries with daughters or son’s daughters.\

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46 Sir Edward Ryan: Digest ofMohammaden Law
Among residuaries the nearer will be preferred. There are six sharers who under certain conditions become the residuaries: father, grandfather, daughter, son's daughter, full sister and consanguine sister. Father and grand-father sometimes inherits in both the capacities as sharer and as residuary. Daughter, son's daughter, full sister and consanguine sister are four females who inherits either as a sharer or as residuaries under certain circumstances.

Distant Kindered

About the distant kindered there is a Hadith narrated by Ibn Abbas, the Prophet (PBUH) of Allah (SWT) said, “give the faraid to those who are entitled to receive it. Then whatever remains, should be given to closest male relatives of the deceased.”[^47] Distant kindered are meant those blood relations who are not competent to inherit either as sharers or as residuaries.[^48] These distant kindered are consist of cognates and females. Majority of the companions of the Prophet (PBUH) accepted that the distant kindered be entitled to get property as heir. In the absence of any general and special custom to the contrary, the distant kindered would succeed against any person whose relations are undefined.[^49] But Imam Malik and Imam Shafai do not subscribe to this view.[^50] Distant Kindered are also of four kinds:

- Descendants of the deceased
- Ascendants of the deceased
- Descendants of parents of the deceased

[^47]: Sahih Bukhari Vol. 8, translated by M.M. Khan, Chapter 5, Jr. No 2309.
[^48]: Tayyabjiop cit p. 818.
[^50]: Al-Haj Mohd Ullah; The Muslim Law of Inheritance.
• Descendants of the grand parents of the deceased

There is an acute controversy about to whom the preference should be given over the other. According to Abu Hanifa preference should be given to second class over first class then third then fourth. But Abu Yousuf and Mohd Hasan bin Ziyad reported from Abu Hanifa that the order of preference should be according to the first, second third and fourth. The remotest relative will inherit under this head.

The fluctuation of Shares among the Sharers and Residuaries

Though the shares of the sharers are prescribed in the Holy Quran and fixed, but according to the situational circumstances, sometimes the share also fluctuate. All the twelve sharers can not get their shares at a one and the same time. There are some conditions which are also prescribed in Holy Quran, which governs the actual succession and the position of sharers, residuaries and distant kindered, at the time of the devolution of property of the deceased. Now the position of each sharer in different condition is necessary to be discussed to understand the succession easily.

Male Sharer

Father - “And to parents each of them shall have 1/6 part of the inheritance if he has son, but if he has no issue (son) and his parents are his heirs then his mother shall be entitled to 1/3 and if he have brethren, then his mother must come 1/6 after any bequest or debts.”

\[51\] Al-Sirajiah, cited by Mohd Ullah.
\[52\] Abdul Serang v Putee Bibi (1902) 29, Cal. 738.
\[53\] Holy Quran IV : II
Any one cannot exclude the father

- He is a sharer of 1/6 along with son or son’s son (hls)
- He is sharer and residuary both, when there is a daughter or son’s daughter (hls) and no son or son’s son.
- He becomes residuary with mother if there is no child or son’s child.

Examples:

1. Father - 1/6
   Son (hls) - 5/6

2. Father - 1/2
   Daughter - 1/2

3. Father - 2/3
   Mother - 1/3

**True Grandfather** - There are Two Hadiths relating to the right of true grand father from Ibn Abbas, “grand father is either treated or dealt with as

- True grandfather can be entirely excluded by father

- In the absence of father the true grand father inherit like the father but-
  - He can not reduce the mother's share to the 1/3 of the residue,
  - He can not exclude paternal grand father,
  - The full or consanguine brother, in existence of the grand father shall not be excluded and the grand father shall get the share equal to that of the brother,
  - Father's mother in the existence of father, stands excluded but she shall not be excluded by the grand father.

Examples:

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1. Father - 1/6
   Grandfather - excluded (P)
   Son (hls) - 5/6
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Uterine Brother - "If a man or a woman be succeeded by a collateral relation (having left neither a parent nor a child) and the deceased have a (uterine) brother or sister then to each of them twain 1/6 and if they be more than two, then they shall be sharers in 1/3 after payment of bequest and debt."\(^{54}\)

- Uterine brother be excluded by the child or son's child (hls).
- Uterine brother be excluded by the father and grand father.
- The share will be 1/6.
- If two or more then 1/3 (collectively).

Example:

Father's brother - 2/3 (F) — FB\(_{2/3}\)
Uterine brother - 1/6
Uterine sister - 1/6 (P) — UB\(_{1/6}\) — US\(_{1/6}\)

\(^{54}\) Holy Quran IV : 11-12
**Husband** "And unto you belongeth ½ of that which your wives leave if they have no issue but if they have a child then to you 1/4 of what they shall leave after paying bequest and debts."\(^{55}\)

- Husband takes ¼ share along with children or son’s children
- He takes ½ if there is no children or son’s children

Examples:

1. Husband - 1/4
   Son - 2/3 (of residue)
   Daughter - 1/3

2. Husband - 1/2
   Daughter’s son - 1/2

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\(^{55}\) Holy Quran IV : 12
Female Sharers

Wife - "And unto them (your wives) belongeth ¼ part of that which ye leave, if ye have no issue; but if ye have issue, then they shall have an 1/8 part of what ye leave after paying the bequeth and debts."^66

- The wife inherits in every situation.
- The wife or wives take ¼ if there is no child or child of a son (hls).
- The wife or wives takes 1/8 when there is a child of a son (hls)
- The word wife or widow means the wife of valid marriage. In case of fasid or void marriage there shall pass no inheritance between them.
- The Kitabiah wife (who has not been converted) is not entitled to inherit each other. On the basis of this difference of status, several distinctions in law have been maintained between Muslim and Kitabiah wife e.g. if a Muslim wife commits adultery she is awarded the fixed 'Hadd' punishment but Kitabiah wife is not punished for adultery with Hadd.
- In the case of divorce, if the husband has, in his sound health, irrevocably divorce, at once, breaks off. The divorce having been effect in sound health, the husband dying during the wife's observance of probationary period (Iddat) makes no difference. The wife shall not be his heir.

^66 Holy Quran IV : XII
^58 Rehman, Dr : op.cit.p. 479, Tanzilur
^59 Ibid p. 132
In the case of Khula, Mubarat or divorced by court degree they will not inherit each other.

The pronouncement of divorce during the death illness shall not affect the right of inheritance of wife.

Examples:

1. Wife - 1/4  \[S_{3/4}(P)\] \[W_{1/4}\]
   Sister - 3/4 (full or consanguine)

2. Wife - 1/8  \[(P)W_{1/8}\]
   Son's daughter - 7/8  \[(S)\]  \[S'D\_{7/8}\]

**Daughter** - "Concerning the provision for children, Allah (SWT) chargeth you to the male equivalent of the portion of two females and if there be a woman only, if more than two then they shall have 2/3 of the inheritance and if there be only one she have 1/2."^{60}

- The daughter cannot be excluded.
- If there is no son-

^{60} Holy Quran IV : 11
• The daughter will take ½ of the property if she is alone.
• In case there are more than one daughter then 2/3 collectively.
• If there is a son then she will inherit as residuary and her share will be half of a male (brother).

Examples:

1. Wife - 1/8  
   Son - 2/3 (of 7/8)  
   Daughter - 1/3 (of 7/8)  

2. Son - 2/3  
   Daughter - 1/3  

3. Son’s son - 1/3  
   2 daughters - 2/3 (Collectively)  

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There is also a Hadith relating to the rights of the daughter – from Jabir bin Abdullah – “A woman came with her two daughters before the Prophet (PBUH) of Allah (SWT) and said “O” Prophet (PBUH) of Allah (SWT) these two daughters are of Sabit bin Qais who was killed in the battle of Uhud, their uncle has taken away the entire property and has left nothing for them. It is not possible to get them married without property. The Prophet (PBUH) answered, ‘Allah (SWT) alone could decide”. There after recited the Quranic verses as stated in Surah Nisan “Usi Kimullah-I-awladikum” were revealed. The Prophet (PBUH) sent for the woman and the uncle and told him to give 2/3 to the two daughters and 1/8 to widow and to take for himself the residue.”^61

**Son’s daughter**

- If there is no child of the deceased then son’s daughter will be sharer if alone 1/2 and if two or more then two 2/3 but with equal son’s son she become residuary.

- If there is a son then children of the son will inherit nothing.

- If there is only one daughter and no son, higher son’s son or equal son’s son then she will inherit 1/6 as sharer.

- If there is more than one daughter and these have taken their 2/3 share then son’s daughter shall be excluded and get nothing.

- If there is lower son’s son and she does not inherit as sharer she will succeed as a residuary.

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61 Abu Daud, Tirmizi.
Examples:

1. 2 daughters - 2/3
   Son's son - 2/3 (of 1/3)
   Son's daughter - 1/3 (of 1/3)

2. Daughter - 1/2
   Son's son - 2/3 (of 1/2)
   Son's daughter - 1/3 (of 1/2)
Full Sister - "If a man die childless and have a sister ⅔ of the heritage shall be hers and he would have inherited from her if she died childless: and if there be two or more then 2/3 of the heritage, and if there be bretheren, both males and females, the male shall have portion of two females, Allah (SWT) makes this manifest to you that ye en not, Allah (SWT) knows of all things." Holy Quran declares that the share of male child be equivalent of two females.

- If there is no son or son's son (hls) father, grand father (hhs) or full bother, then full sister will inherit in the capacity of sharer, her share will be ⅔ if alone and 2/3 if more than one.

- With full brother she will become residuary.

- If there is son's daughter the full sister become residuary.

Examples:

1. Mother - 1/6
   Full sisters - 2/3 (collectively)
   Uterine brother - 1/6

\[\text{M}_{1/6} \quad \text{UB}_{1/6} \quad \text{F}_{1/3} \quad \text{FS}_{1/3} \quad \text{P}\]

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62 Holy Quran: IV – 177
2. Daughter - 1/2  
Son's daughter - 1/6  
Full Sister - 1/3

(P) F.S_{1/3}
(S) D_{1/2}
S'D_{1/6}

Consanguine Sister

- The consanguine sister will inherit ½ if alone and 2/3 if two or more only, if there is no child, child of son (hls), father, true grand father (hhs), father's brother full sister and consanguine brother.

- With the consanguine brother she will inherit as residuary.

- If there is only one full sister and one consanguine sister then she will inherit as a sharer 1/6.

- If there is no full sister then she will be a residuary with daughter or with son's daughter.
Example:

1. Full Sister - 1/2
   Consanguine sister - 1/6
   Mother - 1/6
   Brother's son - 1/6

\[
\begin{array}{ccc}
\text{C'S}_{1/6} & \text{(P)} & \text{F.S}_{1/2} \text{ (B)} \\
\text{M}_{1/6} & & \\
\text{S}_{1/6} & & \\
\end{array}
\]

**Uterine Sister** - There are two situations in which Uterine sister is entitled to inherit.

- If there is no issue of the deceased or his son.
- If there is neither father nor grand father.

There share will be 1/6 if alone, 2/3 if more than one.

**Mother**

- Mother can never be excluded but her share fluctuate according to the situations.
- The mother will take 1/6 share as sharer with the child or with sister, child (hls) or with two or more brother or sister.
- Her share will be 1/3 if there is no child (hls) and sister or brother.
• If there is husband or a wife and both parents then the mother will inherit 1/3 of what remaining after satisfying the share of husband or wife and the residue is to father.

• If in a place of father there is grand father mother’s share will be 1/3 of the whole property.

• The step mother of the deceased is not entitled to inherit as there is neither relationship by lineage or by affinity.

Example:

1. Father - 1/6
Mother - 1/6
Son - 2/3 (of 2/3)
Daughter - 1/3 (of 2/3)
Grandmother

- The share of true grandmother is 1/6 whether one, two or more whether paternal or maternal.
- The paternal grandmother will inherit 1/6 where there is no mother, father or intermediate true grandfather.
- Maternal grandmother will inherit 1/6 if there is no mother.

Example:  
- Father’s mother - (Excluded by father)
- Mother’s mother - 1/6 (not excluded)
- Father - 5/6 (as residuary)

Aportionment or Computation of Heritage

At the time of allocation of shares to the entitled heirs three situation arises:

- The sum of shares is equal to the heritage
- The sum of the shares exceed the heritage
- The sum of shares is less than heritage
There is no practical problem if the sum of shares and heritage is equal but in other two conditions the problem arises which are solved by the special rules provided under Islamic law by the name of Doctrine of Awl and Doctrine of Radd.

**Doctrine of Awl**

In the situation when the sum of the shares exceed to the heritage, the share of each sharer is diminished or reduced proportionately for example- If a lady dies leaving behind husband and two full sisters. The share of the husband will be $\frac{1}{2}$ and sister’s share will be $\frac{2}{3}$. The total of these shares will exceed the unity.

**Illustration**

Husband $\rightarrow \frac{1}{2} = \frac{3}{6} \text{ reduced to } \frac{3}{7}$

2 full sisters $\rightarrow \frac{2}{3} = \frac{4}{6} \text{ reduced to } \frac{4}{7}$

$$\frac{7}{6} \text{ reduced to } \frac{7}{7}$$

**Explanation** : The proportional shares of $\frac{1}{2} = \frac{3}{6}$ and $\frac{2}{3} = \frac{4}{6}$ the total will $\frac{7}{6}$, we increases the denominator of $\frac{3}{6}$ & $\frac{4}{6}$ to make it equal to the numerator.

**Doctrine of Radd**

In the second situation the problem comes in this way that after allotting the share to the sharer some heritage is left as a residue and there is no residuary. In this situation the residue is returned to the sharers in the proportional way except in the case of husband and wife. In doctrine of Radd to equalize the shares to the heritage the common denominator is decreased. The difference between Awl and Radd is that in the previous
case by increasing the common denominator the sum is equalized but in later case by decreasing the common denominator the shares are equalized.

Illustration: A Muslim dies leaving behind mother and daughter the Quranic shares of mother 1/6 and daughter 1/2 will not exhaust the whole heritage and 1/6 will left as residue. This residue according to rule of Radd will go by Return to the sharers by decreasing the common denominator of fractional share.

Mother 1/6 = 1/6 increased to 1/4
Daughter 1/2 = 3/6 increased to 3/4

\[
\begin{array}{c}
4/6 \\
4/4
\end{array}
\]

In the Case of Husband or Wife

The general exception, of the Doctrine of Radd is that this will not apply in the case of husband or wife. It means they will not get the residue by way of Return. Along with the wife, the sister is not a residuary she will get by Return. With the exception of husband and wife the distant kindered can not succeed so long as there is any sharer or residuary. The doctrine of Return or Radd was discussed at full length in the leading case of Abdul Hamid v Piyare Mirza. According to Shia law the wife is not entitle to Return but the rigour of law has been modified on equitable consideration. It has been held that the wife even if she had no issue got

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all property of the deceased husband against the principle of Escheat, and against the classical rule. In Shia law a childless widow is not entitled to take share in landed property. But in *Ali Saheb v Hajra Begum*, it was held that if there was no residuary the residue reverted to the sharer. It is applicable where the husband or wife is the sharer. In another case of *Abdul Matin v Abdul Aziz*, the residue was given to distant kindred instead of reverting back to husband.

**Shia Law of Inheritance**

Hanafis and Ithna Asharis interpret Holy Quran, which is the basic source of Islamic law, differently in relation to the law of inheritance. Hanafi jurists interpreted the Holy Quran in a literal and strict meaning, while the Ithna Asharis has interpreted it in a liberal and wider sense. The second thing, which makes a contrast between the Sunnis and Shias law of inheritance, is that under Hanafi law the pre Islamic customary laws were kept intact which were not specially abrogated by the Quranic injunctions. On the other hand Ithna-Asharis had abrogated the old customary laws and developed a new set of principles on the basis of Quranic injunctions. Under Shia law the right of inheritance emerged on two bases, either the claimant is related to the deceased by sabab, which means by marriage or by nasab, which means consanguinity.

- By Sabab - Husband & Wife
- By Nasab - All relatives entitle to inherit

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67 Isab v Isab (1920) 44 Bomb. 947.
68 Muzaffar Ali v Prabhavati (1907) 29 All 640.
69 Supra note 64.
70 AIR (1991) Gau. 70.
All heirs under Shia law are either sharer or residuaries. There is no concept of distant kindred in Shia law.\(^2\)

**Comparison of Sunni & Shia Law of Inheritance**

- Under Shia law the cognates and agnates were treated equally in the matter of inheritance.\(^3\) Sunni prefer the near in degree to the more remote whilst Shias apply the rule of propinquity to all cases without distinction of class or sex.

**Illustration**: If a person dies leaving behind him a brother's son and brother's grand son and his own daughter's son. Among the Sunnis the brother's son being a male agnate and nearer to the deceased than the brother's grand son inherit in preference to others but among Shias, the daughter's son being nearer in blood, would exclude the others.\(^4\)

**Examples:**

<table>
<thead>
<tr>
<th>Sunni Law</th>
<th>Shia Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>(P)</td>
<td>(B)</td>
</tr>
<tr>
<td>(D)</td>
<td>S (inherit whole)</td>
</tr>
<tr>
<td>D'S(excluded)</td>
<td>S'S (excluded)</td>
</tr>
</tbody>
</table>


\(^3\) Ibid p. 891

• Under Shia law class I heirs wholly exclude class II and III heirs, class I exclude class three. Among class III nears in degree exclude the remorter.

• Both Shia & Sunni law does not recognize the doctrine of the representation, to entitle the person to inherit, in the place of his father or mother. But under Shia law it is applied to decide the quantum of the share of any given person, under Sunni law it is not applied at all.75

• Under Sunni law a daughter’s daughter as an uterine relation has no place in the inheritance until all the heirs and residuaries are exhausted but under Shia law she would inherit the share of her mother.76

• When the children of a son coexist with the children of a daughter, the son’s children shall take 2/3 and daughter’s children 1/3 the respective share of their parents in Shia law. Under Sunni law the children of a daughter are uterine relations and postponed until the sharers and the residuaries are exhausted.77

• The Shia law recognized partly the principle of primogeniture, holding that the eldest son is entitle to sabre, the Holy Quran, the signet, the robes of honour and other vestments of his deceased father but not under Sunni law.78

• When there is a half brother by the same mother and the son of a full brother, the estate goes to the half brother in Shia law but under Sunni law the half brother get 1/6 and the remainder goes to the son of the full brother.79

75 Md. Khan M A. *Islamic Law of Inheritance* p 179
76 Ibid p 78
77 Ibid p 79
78 Ibid p 74
79 Ibid p 84
Examples:

Sunni Law

(P) $\text{UB}_{1/6}$ (B) $S_{5/6}$

Shia Law

(P) $\text{UB}$ (B) $S$

- Where there are paternal uncles and aunts they take the inheritance in the usual portion two to one but under Sunni law the entire estate will go to paternal uncles to the exclusion of aunts.\(^{80}\)

- Under Shia law the distribution of the property is according to per-stripe but under Sunni law as per capita.\(^{81}\)

- Under Shia law the females however remote will inherit with the son.\(^{82}\)

- If a woman be divorced by a husband during an illness of which he does not recover and which eventually causes his death, her inheritance right will continue for the one year under Shia law but under Sunni law until the expiration of the women’s period of probation.\(^{83}\)

- Under Shia law there is a difference between real and personal estate, but not under Sunni law. If there is no child then Shia widow will be entitled to 1/2 of the personal estate only, including house hold, trees and buildings but not inherit in real estate. In case there are children then 1/8 of both personal and real property.\(^{84}\)

- In Shia law if a non Muslim dies leaving behind a Muslim and a non Muslim heir, the Muslim heir though remote in degree,
succeed in preference to the non Muslim heir but under Sunni law, non Muslim will not entitle to inherit.

- Under Shia law the doctrine of increase applies only against the daughter and sister but under Sunni law it extends to all sharer alike.

- Under Shia law besides husband or wife, in certain cases the mother and uterine brother or uterine sister also does not share in the Return but under Sunni law the entire sharer except husband or wife share in the Return.

- Under Shia law only intentional murderer is excluded from inheritance but under Sunni law any one who caused the murder is excluded.

- Under Shia law the illegitimate child is entitled to inherit neither from father nor from mother but under Sunni law the illegitimate child will inherit only from the mother but not from the father.

- Both under Shia and Sunni law these heirs never are excluded from succession-father, mother, husband and wife.

On the basis of above discussion, it can be concluded that the Islamic law of inheritance provides minute details about the distribution of heritage and as Sir William correctly said that there is no possible question relating to inheritance which is not rapidly answered by the Islamic system of inheritance. The females have got the right to inherit property with absolute power to appropriate it for the first time in the world by Islam. Number of females was not only made entitled to inherit but the Holy Quran also fixed their shares. These rights were given to females at the time when the females of the rest of the world were not even entitled to hold the property. Though in Hindu legal system there was the concept of

\[85\] Ibid p. 97.
\[86\] Ahmad Aqil : Muslim Law (revised by Prof. I.A. Khan), p. 375.
\[87\] Ibid
stridhana but that was very complicated and not absolute and the daughter were not entitle to inherit the ancestral property. At last it can be said that Islam provides an elaborate system of inheritance, which is fixed, scientific and beautifully harmonized.

B. Under Hindu Law

Knowledge, of isolated details so long as they are not deduced from and connected with their under lying principles, is however as slippery as it is confusing and it is better to have a firm grasp over few fundamental principles than to collect mechanically a mass of disjointed details.\(^88\)

Hindu law developed as a part of religion. There is an acute controversy about it because custom is also acknowledged as one of the main source of law. Myane says,\(^89\) “Hindu law is the law of the Smritis as expounded in the Sanskrit Commentaries and Digest which as modified and supplemented by custom, is administered by the court.”

The first lawgiver of Hindu law, Manu belonged to the old basti of Manali in Himachal Pradesh. From a small temple where there was never an idol, he formulates the basic postulate of the rule of law governing mankind, which was first written on the leaves, now known as Manu Smriti.\(^90\)

The present Hindu law is an out come of ancient dharamshastras and their commentaries, discordant practices and conflicting decisions. As Derrett pointed out,\(^91\) “flexibility diversity, adaptality and genius for

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adjustment without changing one’s entity, are the hallmarks of Hinduism. It is properly not less a way of life than a religion,”

**Definition of Hindu** The meaning of the term Hindu as commonly understood is stated by the court as, “it is a matter of common knowledge that Hinduism embraces within itself so many diverse forms of beliefs, faiths, practices and worships that it is difficult to define ‘Hindu’ with in precision”\(^{92}\) In Indian Succession Act, 1925, the word ‘Hindu’ is used in theological sense as distinguished from a national or racial sense as it includes Arya Samajis\(^{93}\) and Brahmos etc.\(^{94}\) The Hindu Succession Act 1956, The Hindu Marriage Act, 1955, Hindu Minority & Guardianship Act, 1956, all prescribed three conditions for the purpose of the application of the Act in clause ‘a’ ‘b’ and ‘c’

- Hindu by religion
- Buddhist, Jain or Sikh by religion
- Who are not Muslim, Christain, Parsi and Jew, is Hindu.

According to Indian Limitation Act, Hindu does not mean a person who is ethnologically a Hindu but also a person who has the legal status of a Hindu and is governed in the matter of inheritance by Hindu law.\(^{95}\)

Now it is well settled that the term ‘Hindu’ is so vast that no precise definition can be given. On the basis of above definition given by different statutes and judicial decisions, the applicability of Hindu law will decide whether the person is Hindu or not. Therefore, we can say that barring

\(^{93}\) Mst. Suraj v Attar 1 Pat. 706.
\(^{94}\) In Goods of Gyamendra Nath 49 Cal. 1069.
\(^{95}\) Rajah Chatter Singh v Diwan Roshan Singh ILR (1946) Nag. 159.
Muslims, Christians, Jews and Parsis all other habitants, living in India who is subject to Hindu law are considered as Hindus.

Succession means the acquisition of ownership through kinship to the last holder independent of any voluntary act on his part designed to have this effect.\(^\text{96}\)

Before, 1956, there was nothing at much variance in any institution of Hindu Law than the law of succession. No uniform system of succession existed even within the school of Mitakshara. The foundation of the law of succession was based upon the text of Manu –

"Sons take the property to the nearest sapinda the inheritance next belongs."\(^\text{97}\)

The difference between the schools and within the schools relating to the laws of succession, was because of the different interpretations, were given by the propounders of different schools. Mitakshara considers that the wealth becomes the property of another solely by reason of his kinship to the owner.\(^\text{98}\) According to Dayabhaga ownership to a person's property, by virtue of kinship to that individual arises, only when that person's ownership comes to an end, which happens usually on his death.\(^\text{99}\) It means that Dayabhaga recognized the right of heirs in the property of their kinsman arises on the death of that person. On the other hand Mitakshara considers that the accrual of ownership does not depend upon the cession of ownership of previous owner but they acquire the

\(^{96}\) Supra note 1 p. 125.  
\(^{97}\) Supra note 1 p. 126.  
\(^{98}\) Supra note 1 p. 126.  
\(^{99}\) Ibid.
property at the moment of their birth and become the co-owner of the same property. In Dayabhaga it is death, which confirms the ownership, and in Mitakshara it is birth, which confirm the ownership.

**Women’s, Property Right Under Old Hindu Law**

The degraded position of women in ancient India precluded entirely the idea of their, having been regarded as heirs of the family property. In early times several writers had quoted a text from Vedas in which the general unfitness of woman from heritage seemed to be pronounced. At that time even it could not be imagined that females have any property right except Stridhana. Hindu law was very harsh on the point regarding inheritance of females. Baudhyana, reputed founder of one of the school of Yajurveda, excluded females from inheritance on authority of the Sruti text “woman are considered to be destitute of strength and of a portion.” Baudhyana says, “women are devoid of prowess and incompetent to inherit, women are use less.” He propounded that the Vedas declared no inheritance to a woman. Some of sayings of Vedas relating to the succession will clarify the position explicitly.

**Rig Veda** “speaks about the individual proprietorship of a log of wood”

“The text of Vedas “speaks of the sons dividing father’s property after the demise of the father.”

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99 Ibid.
101 Baudhyanas Dharmashasta 1 22, 47.
102 X : 155 : 3
103 III : 51 : 12.

92
"It speaks of unmarried daughter stayig in father’s home and asking for a share of father’s property"\textsuperscript{104}

**Rig Veda** again syas “A begotten son does not give paternal wealth to his sister. He gets her married.”\textsuperscript{105}

In the above mentioned exerts of the Rig Veda, it is evident that only for unmarried daughter there is a provision but for the married girl there is no provision. Instead brother is not bound to give her share in property, his only responsibility is to get her married. It is proved by these exerts that in primitive society, the females had no share in property.

In post Vedic period some changes were brought and the woman who have not got the Stridhana from their husband or father-in-law shall inherit the property of their own father. It is said that after the death of father the son divide the father’s wealth and daughters will divide among them the Stridhan, if there is no daughter then the son will take the Stridhana.\textsuperscript{106}

In Śmṛiti period some changes had been brought but heritable capacity was made subject to certain conditions. The position of woman in the joint family was even worse and at the mercy of surviving brothers.

The Nirukhta writer Yasha says “The wise men holds that both the children have the right of inheritance”\textsuperscript{107} About the right of inheritance of widow Kane writes\textsuperscript{108} that “Vishwarupa allowed a share of property to the

\textsuperscript{104} 11 : 17 . 7.

\textsuperscript{105} III: 31.2

\textsuperscript{106} Yajnavalaka:11. 116-119.

\textsuperscript{107} Vide L. Sarup’s Translation : p. 40.

\textsuperscript{108} Kane np cit p. 266.
widows of deceased son and grandsons of the intestate when partition take place during his life time. Jimutvahna said that a widow of a deceased person who lived separately or in joint family succeeded her husband’s estate.\textsuperscript{109} Vijnaneshwara was liberal towards woman and allowed a widow to be the heir of her deceased husband.\textsuperscript{110} He also mentioned great grand mothers right to inherit.\textsuperscript{111}

By the above discussion it is evident that the old Hindu Law was very insensitive towards women. To remove all the diversities and to improve the condition of woman time to time some legislative steps had been taken e.g.- the passing of Indian Succession Act, 1865, which gave very limited rights of property to women. The limitation was removed by the passing of Married Women’s Right to Property Act, 1874. After that Indian Succession Act, 1925, came into existence, which was confined to the Parsis, Chritstains and Jews etc and did not better for Hindu females. Then Hindu law of Inheritance (Amendment) Act, 1929, was passed. But the fundamental changes had been brought in the condition of Hindu Women by the Women’s Right to Property Act, 1937. Sec. 3 of the said Act was the most important section, which specially provided provisions for the women’s succession. But Hindu female, provided under the Act of 1937, was unfortunate enough to be excluded so long from the domain of Hindu law of Inheritance simply because they were females. “Women are devoid of the sense and incompetent to inherit” is the sharp edge sword that was used to cut their throat.\textsuperscript{112}

\textsuperscript{109} Dayabhaga p. 256.
\textsuperscript{110} Kane : op. cit. p. 260.
\textsuperscript{111} Mayne & Iyengar Op cit
\textsuperscript{112} Singh Raghunath “The Hindu Women’s Right to Property Act, 1937”, AIR (1937), p. 107
Though so many efforts have been made to improve the condition of the Hindu females but the radical changes came into being only in 1956, when the Hindu Succession Act of 1956, was passed by the Parliament. It is considered piecemeal and brought revolutionary changes in the history of women’s property right.

**Fundamental Changes Brought by the Act of 1956**

- All schools are governed by the uniform rules of succession.
- The heirs are divided into four groups and the preference is based upon the blood relationship and other rational conditions.
- The female’s share was made equal with her counterpart male member.
- The limited estate of widow is converted into absolute ownership.
- The kinds of the property as Women Estate and Stridhana are abolished whatever kind of property, woman possessed or inherited, is her absolute property.
- All cognates and agnates are made entitled to inherit.
- Sec. 14 and 26 have retrospective effect.
- In certain situation the undivided interest of a coparcener may devolve by succession not by survivorship.
- An undivided interest of a coparcenary in a Mitakshara joint family property is made heritable and capable of being disposed of by testamentary documents.

Before going into the discussion of the changes brought and provision made by the said Act. It is better to have a look over the concepts of the coparcenary, joint family and Hindu undivided family.
Coparcenary

A coparcenary is a narrower body or an inner circle within the joint family and consists of only those persons who have taken by birth an interest in the property and also have a right to enforce a partition. It commences with a common ancestor and includes a holder of joint property up to the three degrees. No woman can be a coparcener.

But now by the amendment Act of 2005 daughter is also made a coparcener.

Joint Family

Mitakshara joint family is a broader body than coparcenary and includes the wife and unmarried daughter of a coparcener in the member of the joint family. It is purely a creature of law and cannot be created by the acts of the parties. The joint status being the result of birth and possession, of joint family property, is not necessary to constitute it.

Hindu Undivided Family

It is a normal condition of Hindu society who is joint in estate, food and worship. Hindu undivided family is a concept. Karta does all religious duties and observance.

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116 Haridas v Devkuvaban, 50 Bomb. 443 at 447.
117 Ibid
The Position of Women after 1956

After the passing of the Act of 1956, the situation is better though not best. The Act though considered as the piecemeal in the field of the property rights of woman but it is also criticized by eminent thinker of the Hindu law, like Derrett whose objection, about sections 8 to 13, is that there is a long list of heirs in class I and there is also no limits of agnates and cognates. So the rule of Government escheat is totally disappeared.\(^\text{118}\)

By analysis of the certain provisions of the Hindu Succession Act of 1956, which relates to the intestate succession and in which certain changes were brought by the Act, it would be clear that whether the said Act really improved the position of women's property right or still it need some changes. So to know the exact position we will have a critical look upon some important sections from section 6\(^{th}\) to 23\(^{rd}\) of the Act of 1956, step by step. These sections have elaborate provisions relating to the intestate succession.


Section 6 before 2005

"When a Hindu male dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act."

"Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in

that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.”

Explanation 1: For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed, to be the share in the property that would have been allotted to him, if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2: Nothing contained in the proviso of this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Section 6 consists of four paragraphs. The first paragraph says about the devolution of Interest by survivorship in Hindu coparcenary. The second paragraph contains the exceptions to the survivorship by devolution. The third Para, which is an explanation talks about the deemed or notional partition and last one, barred the separated member from claiming the interest in coparcenary.

Section 6 has recognized the female as an heir to inherit the property without abolishing the coparcenary and rule of survivorship. There is also an exception to the rule of survivorship in the Mitakshara coparcenary that if the deceased is survived by a male or female relative who can claim through such female then the interest of the deceased in the property shall be devolve by the intestate succession and not by
survivorship. The only male relative specified in class I who first claims through a female relative is the son of a predeceased daughter.\textsuperscript{119}

Section 6 has brought revolutionary changes in the history of woman's property right but also bring a number of queries in the mind of legal luminaries and clerics of law which were responded by the judiciary time to time, legal experts also tries to explain the provisions.

Whether the rule of survivorship really exists? The coparcenary or rule of survivorship is not abrogated by sec.6 but it will be futile to think a family in which there will be no female of class I heir or a person who have an interest through such females. Sec.6 says that the interest of the coparcener would be devolved by survivorship but if there are any female of class I heir or a male who claims through such female then the property shall be devolved according to Act of 1956 or testamentary succession and not by survivorship.\textsuperscript{120} So it can be said that apparently the rule of survivorship is not extinguished by the Act of 1956, but in reality it hardly exist. There may be a reason not to abolish the rule altogether because the sudden change in joint family may have adverse effect upon the existing state of things\textsuperscript{121}

The second question, which needs to be considered, is, whether this notional partition is treated as actual partition? Sec. 6 talks about the share of females without making them a coparcener, in the property of the deceased, which he has in the coparcenary property. The essence of

\textsuperscript{119} Prof. Raman S. Venkata : N.R. Rag havachariar's Hindu Law VIII ed. (1987), P.N. 926, See also Ranganathan Chettiar v Annamalai Mudaliar 80, L.E. 258 (1967) 1 MLJ 389.
\textsuperscript{120} Laxmi N Tuda v Basti Mahajan AIR (2004) Jhar 121.
\textsuperscript{121} Pataskar LSD 2 v 56 Col. 6996.
coparcenary under Mitakshara law is the unity of ownership¹²² and there is no question of share during the unity. Relating the coparcenary how it is possible to ascertain the share. For this purpose the legislature introduced the doctrine of notional partition, which is a legal fiction, apart from actual or real partition without affecting the shares or interest or status of the other coparceners whose interest will be demarcated on the real partition. The Bombay High Court¹²³ clarified the position by saying that the idea of notional partition should be construed strictly just to ascertain the share of a deceased in the joint family property. It also talked about the position that in the case of only male heir,¹²⁴ there was no such partition. Actually to save the rule of survivorship this provision of notional partition was introduced as an exception. As Justice Patel said, that without such fictional partition the share of a deceased could not be ascertained which was necessary for the shares of females who were entitle only in his share in the property and not in whole joint family property as a coparcener.

The next question which comes in mind is that How the share of a deceased be determined? As there is a rule of survivorship in the coparcenary so the shares are indefinite till the actual partition took place. The interest of the coparcener fluctuates with each birth and death. That is why the section talked about the deemed partition in which it was imagined that what would be the share of a deceased if the partition took place just before his death, subsequent fluctuation would make no effect in the share

¹²² Katama Natchair v the Raja of Sivaganga (1861-) G.M. IA 543, Supreme Court Encyclopedia Vol. 3, p.246
¹²³ Shivgonda v Director of Settlement, (1992) Bom. 72
of deceased. \cite{125} It is made clear by the explanation, that it is immaterial that the deceased coparcener is entitled to claim partition or not. \cite{126}

Now the next question can be asked whether the **devolution of property by notional partition be binding on the parties**? Supreme Court gives the answer of the above question in the case of *Maharashtra v Narayan Rao*, \cite{127} the court observed that this assumption once made is irrevocable. There is a leading case of Bombay High Court *Rangubai v Laxmanan*, \cite{128} in which a widow and stepson survived a deceased. In this case there was no possibility of getting any share of the widow in a real partition, as the stepson as a sole surviving coparcener had inherited the whole and there was no one who asked for partition. Though, if the partition took place, she would be entitled to equal share of the son, but the court by the full bench made it clear that the deemed partition would be binding, so treated as actual partition, which got recognition in series of cases by other High Courts. The Supreme Court \cite{129} said that the interpretations of provision of Section 6, directed to enlarge the share of female heirs qualitatively and quantitatively to achieve the intention of the legislature.

It gives the birth to another question, **whether the death of a coparcener would dissolve the coparcenary**? In *P. Govinda Reddy v Golla Qbulamma* \cite{130} the full bench of Andhra Pradesh High Court opined that the coparcenary would continue till the actual partition and the death

\begin{footnotesize}
\begin{enumerate}
\item \cite{125} Karupa v Palaniammal, AIR (1963), Mad. 254.
\item \cite{126} Sushila v Narayan Rao, AIR (1975), Bom. 257.
\item \cite{127} AIR (1985) SC 716.
\item \cite{128} AIR (966), Bom. 169.
\item \cite{129} Gurupad v Hira Bai, AIR (1978) SC 1239.
\item \cite{130} AIR (1971) AP. 363.
\end{enumerate}
\end{footnotesize}
of a coparcenary would not effect the continuance of the coparcener in any way.

An other question which is necessary to be considered is, whether a woman be a coparcener and a Karta? The provision of the Section 6 of Act said that only male member be a coparcener who has a right by birth in the property. Though in some states, equal coparcenary right to daughter has been given as in Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka etc., but the right conferred by these states has prospective effect. In a case, the deceased left behind his wife, one son and four daughters. He died before the Karnataka Hindu Succession (23 amendment) Act of 1994, came into force by which a new section 6-A was inserted in the Act to give the equal right of coparcenary to the females, but in the given case the court held that succession will be governed by section 6, of the Act of 1956 and son alone was made the coparcener and inherited ½ and the daughter and wife inherit equally along with the son from the other half.

Now come to the other part of the question according to the old Hindu law a woman, who is not a coparcener, cannot be the Karta of joint family, It is also supported by the series of judicial decisions. On the other hand in some cases the judiciary encourages the liberal attitude towards it and held, that woman may be a Karta. Some writers also supported on the basis of old Hindu Law.

131 (2000) AIHC 4013 (Karn).
Another question, which need our attention, is that – **Whether the heirs mentioned in class I be represented by Karta?** The answer was given by the Calcutta High Court,\(^{136}\) that there was a relation between the joint family property and a Karta when the partition made that relation come to an end though section 6 talked about the notional partition instead of actual partition. Karta could not be imagined in a divided property. So class I heir could not be represented by Karta. In a latest case,\(^{137}\) the question was raised about the power of Karta to dispose of the property. Supreme Court held that the Karta is competent to dispose of coparcenary property only in two conditions.

- The disposition must be of a reasonable portion of the property.
- That disposition must be for a recognized pious purpose or for legal necessity.

This was also made clear that the permission of the class I heir is also necessary prior to the disposition of the property.

The other important question is – **What would be the effect of section 6 in relation to woman's own right to inherit?** The judiciary in so many cases discusses this question from time to time. In a latest case,\(^{138}\) it is considered that a wife inherited the interest of her deceased husband in the family property. She was also entitled under section 6 as a female heir in the joint family property and continued to be the member of an undivided family. She had the power to dispose of her undivided interest in the coparcenary property by a will or sale for a valuable

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consideration, though she could not make a gift without the prior consent of the other coparceners.

**Whether the quantum of a daughter's share in inheritance is really equal to her brother?** Though it seems that sec 6 gives equal right of succession to sons and daughters but the actual position was very different. There was unequal distribution of property between the male and female – as the daughter did not get an interest in the joint family property at birth as son had. (Now by the amendment of 2005 she has birthright). She was only entitled to inherit a part of the property, which was the interest of her deceased father in the coparcenary if there was a father and son and a daughter in the family, father and son would be a coparcener in the joint family property and had equal share in the coparcenary property. According to section the son would have taken 6 by the notional partition the share of the father was ascertained which in the given case was $\frac{1}{2}$ and the other $\frac{1}{2}$. From the $\frac{1}{2}$ share of the father the son and daughter would equally inherit. Consequently the son's share would have been $\frac{3}{4}$ and daughter's share would have been $\frac{1}{4}$ of the total property.\(^{139}\)

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**Example:**

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(GF)

(F)_{1/2}  S \frac{1}{2}  D

S_{3/4}  D_{1/4}
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\((1/2 + 1/4 = 3/4)\)

\(^{139}\)Gonslaves Lina; op cit p. 36.
Note:- Now the daughter will also inherit as a coparcener along with father and son, the ancestral property.

Whether the provision of sec 6-A is discriminatory? A drastic change is introduced by the State of Karnataka\textsuperscript{140} in the field of Hindu female right to property by inserting sec 6-A, 'by this section a daughter is made a coparcener by birth and possesses all the rights equal to her brother. But according to clause (d) the married daughter were not entitle to claim such rights as the section 6-A has prospective effect. Although the daughter, who gets married, would get benefit of said section after the commencement of the Act, would get the benefit of the said section. This provision is challenged as being discriminatory between the married and unmarried daughter and against to Article 14 of the Constitution. A significant judgement\textsuperscript{141} has been given by the court that it is not discriminatory but to avoid the reopening of the partition which would resulted in a chaos in the family and unsettled things which were settled long ago and it is also not in contravention of Article 14 of the Constitution.

Section 6 was considered as a revolutionary piece of social legislation. It was one of the most important section of the Act of 1956 dealt, with coparcenary property of a Hindu male but neither, it had any concern with separate property of the Hindu male which was governed by Sec. 8 of the Act, nor it had any interest in governing the female estate. For which there was a provision in Sec 15 & 16. Though it was very important but it created a lot of anomalies and raised so many questions, which were difficult to be answered. But judiciary tried to answer the question\textsuperscript{and gave

\textsuperscript{140} Vide Karnataka Act. 23 of 1999, Sec. 2

\textsuperscript{141} Manjamma v State of Karnataka (1999) AIHC 3003 (Karn.)
effect to the intention of the Parliament. The problems arose because, on the basis of old base a new structure was tried to build. As rule of survivorship was not totally abolished but in practice very rarely existed.

Though there were some problems in effecting this section but it did not mean that it had no importance. In the field of woman's right to property its importance could not be denied. As a critique it can be said that Sec. 6 gave a deathblow to the whole concept of joint family property by abolishing up to some extent the rule of survivorship. The continuance of joint family depended on the whims and caprice of a large number of persons who acquired the right to demand partition under the Act. By the notional partition, the status of the heirs of the deceased would be changed and they became the tenants in common instead of joint tenants with the other surviving coparceners. On the other hand the other coparceners continued to be joint tenants.

It is submitted that the rules laid down in Sec. 6 were compromised having some of the merits and demerits which attended such adjustive legislation.¹⁴²

Section 6 After 2005

The most perplex, bewildering, controversial section 6 of Hindu Succession Act, 1956, is now stand amended by the Hindu succession (amendment) Act of 2005. Section 6, which brought a lot of queries in the mind, which was discussed above, has abolished all the anomalies, ambiguities and confusion. All the discrimination between male and female

are resolved. By the new (amendment) Act, by providing, equal rights to son and daughter in the Hindu Mitakshara coparcenary. Like son the daughter is now a coparcener by birth. The provision of notional partition, survivorship that had created, so many problems in practice has been amended. The controversial share of son and daughter is equalized as she has got the right to inherit the ancestral property in her own right in the Hindu joint family, which is governed by the Mitakshara School. The new provision substitutes section 6 of the principal Act of 1956, which dealt only with property rights of male heirs. It provides that the daughters shall be equally subject to liabilities and disabilities in respect of said property. These provision which are now amended by the new (amendment) Act of 2005 were already exist in some states which were amended by the state amendment Act of Kerala in 1975, Andhra Pradesh in 1986, Tamil Nadu in 1989 and in Maharashtra in 1994.

**Uniform Succession Whether really exist after 1956**

Prior to the passing of the Act of 1956 there were variety of rules, which governed the Hindu Law of succession. But now after the passing of the enactment of 1956 there is a uniform system of succession and all the anomalies abrogated. But in reality there are still different rules governing the succession based upon sex and kind of property. As section 6 deals with the coparcenary property, which have no place in, Dayabagha school because there is no coparcenary and therefore not recognized the rule of survivorship, which is the peculiarity of coparcenary. Sec. 8 to 13

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Chapter -III

deals with the general rules of succession in the case of males. Sec 15 to 16 deals with the rules relating to succession of females.

Section 8 says that in case of Dayabhaga school all the property of a Hindu male whether separate, self acquired, a share, or an interest in the undivided Hindu family, be governed by this section. But in case of Mitakshara school it would apply only in the case of separate or self-acquired property. The kinds of property are already discussed.\footnote{144}

As the word 'property' is not defined in the Act. Time to time a question came before the court whether agricultural land includes the property. \footnote{There is no definition of property under the Hindu Women's Right to Property Act 1937, therefore the term property has to be given its ordinary meaning which would include agricultural land also.\footnote{145}}

Whether Section 8 prospective or retrospective? Section 8 is silent about its effect as section 6 & 7 clearly says that they are prospective in effect. In the case person died before the Act and succession opened before the Act, there will be no difficulty.\footnote{146} If the person died before the Act and succession open after the commencement of the Act which may happen because of widow, or the effect of section 14 which converts the limited estates of widow into full estate. In \textit{Eramma v Veeruppana},\footnote{147} learned judges opined that the words “shall devolve” occurring in this section indicate that its operation is prospective.

\footnotesize{\begin{itemize}
  \item \footnote{111 Supra note Chapter II.}
  \item \footnote{115 A L. Vaynath v Guramma (1979) I SCC See also Tukaran Genba v Laxman Genba Ladhay, AIR (1994) Bom. 247.}
  \item \footnote{146 Appa Saheb v Gurubasawwa, AIR (1960) Mysore 79.}
  \item \footnote{147 AIR (1966), SC 1879.}
\end{itemize}}
Heirs

Under section 8 a new scheme of heirs is listed on the basis of propinquity and affection. The section 8 prescribes\textsuperscript{148} four classes of heirs-

- The heirs specified in class I of the schedule.
- The heirs specified in class II of the schedule.
- The agnates of the deceased.
- The cognates of the deceased.

The order of the succession will be that if there is no class I heir the property will devolve to class II heirs, if no class II heirs then the agnates of the deceased and in failure of that to cognate of the deceased.\textsuperscript{149}

Heirs Specified in Class I

In class I there are twelve heirs who have preference over others and who inherits simultaneously and they cannot exclude other heirs of class I. These are as follows.

- Mother
- Widow
- Daughter
- Son
- Widow of pre deceased son
- Son of pre deceased son
- Daughter of predeceased son of a predeceased son
- Widow of predeceased son of predeceased son
- Daughter of predeceased son of predeceased son
- Son of predeceased son of a predeceased son
- Daughter of a predeceased daughter
- Son of a predeceased daughter
- Son of a predeceased daughter of a predeceased daughter.\textsuperscript{150}

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\textsuperscript{148} Hindu Succession Act, 1956.
\textsuperscript{149} See : Her Jesa Kachara v Lakshman, AIR (1979), Guj. 45.
\textsuperscript{150} The heir has been included by the Hindu Succession (Amendment)Act 2005.
• Daughter of a predeceased daughter of a predeceased daughter.\(^\text{151}\)

• Daughter of a predeceased son of a predeceased daughter.\(^\text{152}\)

• Daughter of a predeceased daughter of a predeceased son.\(^\text{153}\)

Among these heirs there are eight females and four males.

(Note: New heirs are not added in this diagram)

In this given diagram the propositus is indicated by (P) and the predeceased are put in bracket. It shows that a Hindu intestate died leaving behind a widow, a son, a daughter, and son of a predeceased son, a widow of a predeceased son, a daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, son of a predeceased son of a predeceased son, daughter of a predeceased son of

\(^\text{151}\) The heir has been included by the Hindu Succession (Amendment) Act 2005.

\(^\text{152}\) The heir has been included by the Hindu Succession (Amendment) Act 2005.

\(^\text{153}\) The heir has been included by the Hindu Succession (Amendment) Act 2005.
a predeceased son and a widow of a predeceased son of a predeceased son.

Quantum of the Share of class I heir

The next question arises what would be the quantum of the share of these heirs whether it will be per-stripes or per-capita? According to the section 10 of the Hindu Succession Act, 1956, three rules would be followed to allot the shares to the heirs.

- The intestate widow or widows shall take one share if more than one then they will distribute among themselves the allotted one share.

- Son’s daughter and mother, who survived the intestate will take one share each.

- The heir in the branch of predeceased daughter and son shall take between them one share.

In the diagram given below all the twelve heirs of class I have been indicated: (New heirs are not included in this diagram).
Heirs Specified in Class II

In this class of heirs there are nine categories. The entries in first category would inherit simultaneously according to per capita excluding the heirs of other categories. This rule of preference would continue according to the order of entry. These following heirs are categorized in class II heirs.

- Father (father will inherit all the property if there is no class I heir excluding all heirs mention below)
- Son’s daughter’s son, son’s daughter’s daughter, brother, sister.
- Daughter’s son’s son, daughter’s son’s daughter, daughter’s daughter’s son, daughter’s daughter’s daughter.
- Brother’s son, sister’s son, brother’s daughter, sister’s daughter
- Father’s father, father’s mother
- Father’s widow, brother’s widow
- Father’s brother, father’s sister
• Mother's father, mother's mother

• Mother's brother, mother's sister

**Example:** If a Hindu male died leaving behind father, son's daughter's son and daughter, brother and sister. In this problem father will inherit whole excluding all other heirs.

\[
\text{F (Whole property will be inherited by father only)}
\]

\[
(P) \quad S \quad S \quad B
\]

\[
(\text{Excluded}) \quad (\text{Excluded}) \quad (\text{Excluded})
\]

\[
(SD)
\]

\[
SDS \quad SDD \quad (\text{Excluded}) \quad (\text{Excluded})
\]

**Problem:** Take another problem if a Hindu dies leaving behind, son's daughter's son and daughter, brother, sister and brother's son and daughter. The brother's son and daughter will be excluded and all other heirs will inherit simultaneously.

\[
(P) \quad B^{\frac{1}{4}} \quad S^{\frac{1}{4}} \quad (B)
\]

\[
(S)
\]

\[
(D)
\]

\[
BS \quad BD \quad (\text{Excluded}) \quad (\text{Excluded})
\]

\[
SDS^{\frac{1}{4}} \quad SDD^{\frac{1}{4}}
\]
The heirs specified in class III

The heirs in this class are agnates, means the persons related with the propositus through male without the intervention of any females. They may be the descendants, ascendants and collaterals. They will inherit simultaneously.

The heirs specified in class IV

In this class all cognates are made heirs. The cognates are related with the propositus through females. Till all the heirs of class I, II, III were not exhausted the cognates cannot be entitle to inherit. Agnates are preferred over cognates.

Some Controversial Heirs

Legitimate and Illegitimate Heirs: Now proceed towards some issues, which were raised before the court with the passage of time, whether an illegitimate son or daughter is included in the category of son and daughter, or not? Under section 3(1)(i) of Hindu Succession Act of 1956, the term 'child' is defined as 'related by legitimate kinship and illegitimate children are not mentioned in the list of heirs of any class of heirs.\textsuperscript{154}

In another latest case\textsuperscript{155} the right of the widow of an illegitimate child was questioned. The facts of this case were as such that the husband of the widow was the illegitimate child, so he had no right of inheritance. But the father in law of the widow of an illegitimate son had given some


property to the son and daughter-in-law by a deed and possession had also been transferred. The property, which was given to the daughter-in-law, was only for lifetime. By the effect of section 14(1) of the Hindu Succession Act, 1956, that limited interest ripened into absolute one. But in this case court held that daughter-in-law with reference to section 8 means a legitimate daughter-in-law and the widow of an illegitimate son is no heir of her putative father in law.

**Remarried Widow**

Whether the widow would lost her right to inheritance if she re marry before the succession opened? In *Ram Sharan v Ujiyaril*156 the widow of the pre-deceased son had remarried before the succession opened, it was held that she was not entitled to inherit. But the remarriage of the mother did not affect her right to inherit the property of her son, on his death as his heir.157

**Remarried Widow after 2005**

The bar, of remarriage of the widow to inherit the property under section 24 of the Act, 1956, is now been abolished by the new amendment Act of 2005.

**Concubine**

Concubine is entitle to be maintained by her paramour and on his death by his legal heirs, under the Shastric Hindu Law and this right is not taken away by the Hindu Women's Right to Property Act, 1937. After the

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156 (2000) AIHC 938 (M.P.)
157 Ratni Bai v Mankuwar (1978) MPLJ 515.
commencement of the Hindu Succession Act, 1956, this limited right gets enlarged into absolute ownership. A house is given to concubine by her paramour in lieu of her maintenance. She disposed of it by a sale deed. This right of a concubine was challenged. The court held that she was entitled to dispose of the house in whatever manner she liked.\footnote{Prakash v Pushpa Rani (2004) A.P. 463 NOC.}

Whether full blood heirs are preferred to the heirs related to half blood? The answer is given by the Andhra Pradesh High Court in affirmative in a latest case of P. Jayaramiah v Ara Gonda Munnarma.\footnote{AIR (2005) (A.P.) 27}

Enlargement of women's limited estate

Nothing is much controversial than the provision of Sec. 14 of Hindu Succession Act, 1956, which gives absolute rights of ownership over the properties of women in which she had limited interest before the commencement of the Act. Though the controversies were resolved by the judicial pronouncement time to time. Before going into detail it is better to have a glance on the process through which this controversial section 14 have passed.

Rao committee report

The right of woman to hold property had always been subject of controversy. There is a majority of opinion that the doctrine of Hindu woman's limited estate has no real foundation in the smritis. It is also very strange that on one hand the Hindu law recognizes the right of woman to
hold and dispose of her Stridhan property, on the other hand the same law finds her incompetent to deal with other kind of property.\textsuperscript{160}

In between 1954 and 1956 many legislative measures have been taken, to emancipate the Hindu women on the recommendation of Rao Committee.\textsuperscript{161} A Bill was drafted to abolish woman’s limited estate, polygamy and exclusion of female heirs by male heir. The Orthodox Hindus condemned the Bill. The matter was again taken up after independence and the Bill dealing with the law of succession was first introduced in Rajya Sabha.

The provision, which changes the limited right of Hindu female into absolute right in the estate, was clause 16 of Hindu Code Bill, which later came into the shape of sec 14 of Hindu Succession Act, 1956.

Section 14(1): “Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.”

Section 14, has swept away all the traditional limitations, on her powers of disposition of the property. The women’s limited estate, which was a peculiar kind of property almost in any other jurisprudence, was ripened into absolute ownership by this section. She has come out from the state of perpetual tutelage of the old Hindu concept about women and got the status of full and independent ownership, with the full right to enjoy the property in whatever manner she like.

\textsuperscript{160} Sri Partashar H.V.: Parliamentary Debate Rajya Sabha (1955) Vol. 9, 2711,2722.
\textsuperscript{161} Rao Committee Report 116, 119, 120, 1947.
The expression covered by the words used in section 14(1) of Hindu Succession Act, 1956 can be better understood through the pronouncements of the court.

'Any Property': The words 'any property' have wider meaning to cover all types of property movable or immovable tangible or intangible. It also includes any right or interest. The mode of acquisition of property is made immaterial. The explanation attached to the section has removed all doubts, which were attached to constitute the Stridhana, and for Stridhana the mode of acquisition of the property was very important.

'Possessed by female Hindu'

In Lok Sabha a debate was held over the bill and the suggestions were given that instead of the word 'possessed' there should be the word 'acquired' in Section 14(1) because this word can be misused as the female can claim for the property as an absolute owner, given to her in mortgage etc.

The emphasis is given by the Act over the words 'possessed by female Hindu' because it is a pre requisite to ripe the women's limited estate into an absolute ownership. The meaning of the words 'possessed by' is discussed by the Supreme Court, as 'the state of owning or having in one hand or power'. In another case, the courts made it clear that the expression of the word 'possessed' will also cover that case in which a

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163 See the explanation attach to the section 14.
female Hindu owns the property, though she is not in actual or physical or constructive possession over the property. The court,\(^{166}\) also opined that the ambit must not be so extended to cover those cases in which, though the property is in possession of the widow but she has no right over that. The court has not given the benefit of section 14(1) in the case where the property was sold by the widow before the commencement of the Act stating that she would not be considered to be in possession.\(^{167}\)

In a latest case of *Jamuna Bai v Bhola Ram*,\(^{168}\) a widow was in the continuous possession since the death of her husband, along with the brother of her husband. The husband died before the Act of 1937 and the coparcenary property are inherited by survivorship and the brother was the only survivor. So widow had no right. But court held that she was in the possession of the said property and her limited interest would ripen into absolute ownership.

*Female Hindu*: An interesting question came before the Supreme Court in *Beni Bai v Raghubir Prasad*,\(^{169}\) whether the third wife of a Hindu includes the *wife* in Hindu law to give the benefit of this section? The argument were given that under Hindu law one could not have more than one wife so the third marriage was invalid and third wife was not a wife. But the court held that to read *female Hindu* as only first wife was totally misconceived and third wife was also a wife and would entitle to get the benefit of this section. Recently in *Jose v Rama Krishna*\(^{170}\) the question

\(^{166}\) *Eramma v Verruppanna*, AIR (1966) SC 1879.

\(^{167}\) *Keshav v Padmaavati Shantibai & Others*, C.A. No. 79 of 1963 (referred in Supreme Court Encyclopedia Vol. 3, p.246


\(^{170}\) AIR (2004) Ker. 16
before the court was that whether the benefit of section 14 be given to daughter also and her limited interest in property would get enlarged to full right? The court held that the female Hindu includes the daughter also and her limited interest would ripen into absolute ownership.

‘Whether acquired before or after the Commencement of the Act!’

According to section 14 there are two kinds of Property.

- Property acquired before the commencement of the Act.
- Property acquired after the commencement of the Act.

The property which is acquired before the Act, was women's estate or limited estate’. It is distinguished from Stridhana over which she had absolute right, even before the commencement of the Act. By the effect of the said Act, all the differences between limited estate or women’s estate or Stridhana were abolished and all the property in which she has interest and that is also in her possession was made her absolute property. The property acquired after the Act being came into existence, is her absolute property with the limitation of sub section (2) of section 14.\(^{171}\) Sub section (2) has creates a great chaos and controversies and left the task over the judiciary to determine that in particular circumstances, the property will be governed by which sub-section (1) or (2).

‘Shall’ be held by her as full owner there of and not as a limited owner’?

Under old Hindu law, no female could be a coparcener she was only entitled to maintenance and residence, but no right to demand partition.

\(^{171}\) Sub. (2) Sec.24,"Nothing contained in Sub. Sec.1) shall apply to any property acquired by way of gift under a will or any other instrument or under a decree or order of civil court or under an award where the terms of the gift will or other instrument of the decree order or award prescribe a restricted estate in such instrument or the decree order or award prescribe a restricted estate in such property."
The widow succeeds only if there is no male issue, except in case of an illegitimate son of Sudra. The widow of predeceased son and the widow of pre deceased son’s son were not entitled to inherit at all, barring the Bombay school. But by the Act of 1937, some revolutionary changes were introduced in the field of women’s property rights. Two principal changes brought by the Act, were – that the widow become entitled to the same share as her husband had, in the joint family property and got a right to claim partition, as a male owner, in other words she has put her feet in the shoes of her husband, except in Dayabhaga or the Hindu family governed by the customary law.

The second change was that the widow of a deceased was made entitled to equal share to the son and if no male issue then would inherit the whole property. In all these cases the widow had only a limited interest, means – she has an interest in the property till death without any power to dispose of or alienate the property and on her death the property, would revert back to the heirs of the person from whom she had inherited the property.

After the Act of 1956, absolute ownership in Austinian sense had been confirmed over her inherited property to redress the problem faced by the Hindu female.

According to Austin “ownership is a right over a determinate thing indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration.”

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172 The Hindu Women’s Right to Property Act, 1937.
173 Hindu Succession Act, 1956.
175 Tripathi B.N.: An Introduction to Jurisprudence, p. 394.
In order to get the benefit of the Act, it is necessary that the Hindu female have some interest or title in the property, which is in her possession at the commencement of the Act.\(^{176}\)

In *Vankamanidi Venkata Subba Rao v Chatta Palli Seetharamartana*,\(^{177}\) the question was that the right of a Hindu female under an instrument is, whether a recognition of a pre-existing right or right created for the first time? In this case, in a gift deed the interest of a widow was acknowledged, as a limited interest and also mentions that after her death it would revert to her husband's heirs. This deed was made prior to the Act of 1956. It was argued that it was a pre-existing right so the benefit of sub sec (1) be given. But court held that the deed was made in terms of compromise so sub section (2) would apply.

In *Raghubir Singh v Gulab Singh*\(^{178}\) the court in relation to section 14 of the Act considered three points.

- Whether right to maintain was created by the Acts of 1937 or 1946 or it was a pre-existing right under the Shastric law?
- What was the nature and scope of sub section (2) of section 14?
- How the enlargement of widows interest be effected?

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\(^{176}\) Krishna v Akhil (1958) Cal. 671.


On the first point, Supreme Court opined that the maintenance right was existed in the Shartic law and this Act only gave them recognition and statutory backing.

About the nature and scope of sub section (2) of section 14, Supreme Court upheld the position of Tulsamma case,\(^{179}\) as it applied only to the instruments, decrees, awards, and gifts, which create a new title.

On the third point, which was discussed elaborately in the instant case of Raghubir Singh,\(^{180}\) the court views were in affirmative. In this case the husband, (of widow) had executed a will in favour of her grandchild with the stipulation that till the life of testator and his wife they would enjoy full control over the property. The issue was, whether this right of widow would enlarge or not? As, it was not in lieu of maintenance. The court held, that it would be enlarged into absolute ownership.

In another case court opined that where the widow had relinquished her right through a sale, her limited interest would not ripen in the absolute ownership,\(^{181}\) or surrendered her share in the favour of her only son.\(^{182}\) If the husband had created life interest by a will, only in the half share of the properties that would ripen into absolute one.\(^{183}\) But it is also not necessary, that all limited interest would be enlarged into absolute one. It depends, upon the facts of each case where the property is inherited by the wife in lieu of her maintenance and the husband himself has got, only a

\(^{179}\) Supra note 171.

\(^{180}\) Supra note 188.


life interest, over the property from his aunt, by a will in a clear and unambiguous language then it would not ripen into absolute one.\textsuperscript{184}

Where in partition deed the widow take the property for life and she had herself directed with a clear stipulation that after her death the property would go to her sons, the daughter’s claim was not maintainable. Very recently the court holds it.\textsuperscript{185}

The section 14 of Hindu Succession Act, 1956, has upgraded the position of Hindu female. So, far as the property right is concerned, now the Hindu woman is absolutely entitled, to hold the property. More over if she has any sort of right in the property of her husband then she will become the actual owner of that property because of the effect of section 14 of Hindu Succession Act, 1956. Provided that she is in possession of that property either actually or constructively.

**Succession of a Hindu female**

The Act of 1956 though considered as that it gave a deathblow to the old Hindu law of succession and forms a total new structure of the rules of succession. In reality it does not totally depart from the old values. As it supports different scheme of devolution of the property of Hindu females. However it demolishes the differences of school and sub-schools. It also makes no difference about the status and forms of marriages and paid no head to the kind of Stridhana which was the basis and the deciding factor in the old Hindu law of succession. However the Act still divided the property of a female Hindu into two categories and provides different sets


of rules of succession of these two kinds. The source, from which the Hindu female inherits the property, is still a governing factor of Hindu succession in case of an issueless Hindu female. Though it is immaterial when she died leaving behind her own issue.

Sub Section (1) of section 15, prescribed the general rules of succession, which applied to every kind of property of Hindu female, which is capable of being inheritance but sub section (2) of Section 15 state about the exception, which has received a heavy criticism. It talks about the sources from which the property is inherited. There are also two other exceptions of the general rule of succession to which sections 15 & 16 will not apply. Which are as follows:-

- To any property which is subject of any other existing law as for the prevention of fragmentation of agricultural land etc.
- Any property, which is described in section 5 of the Act.

Section 15 says that the property of a Hindu female shall devolve according to the rules prescribed in Section 16. Section 15 has divided the heirs of a Hindu female into five categories:-

**Class I Heirs**

The son, daughter, the children of predeceased son or daughter and husband are class I heirs.

**Illustration:** Suppose a Hindu female died leaving behind son, daughter, husband and son of a predeceased son and daughter and son of a predeceased daughter. The shares will be as follows:

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186 Shri Jain D.C. at 1968 I.S.J.J. 1-4. He shows that Mulla’s explanation is impossible and hopes that Parliament will act to cure the anomalies (referred by Derrett – A Critique of Modern Hindu) p. 258.
The son and daughter include the children of any pre-deceased son or daughter and the son and daughter by natural birth legitimate or illegitimate and validly adopted child. The question about the stepson is very controversial and raised time to time. Recently the question before the court was, whether the stepson of a female was entitle to succeed the estate as her legal heir? The appellate court with reference to the provision of Sec 15 & 16 of Hindu Succession Act held that stepson is not a preferential heir. However, this controversy was not resolved. To resolve the matter Supreme Court in *Lachman Singh v Kripa Singh*, observed the distinction between ‘son’ and ‘step son’ according to the Collins English Dictionary – a ‘son’ means – a male offspring and ‘step son’ means – a son of one’s husband or wife by a former union. Relying on that Delhi High Court held that girl had preferential right over the stepson. Instead of it very recently the issue is decided by Jharkhand High Court in favour of the step son, where the original owner died prior to coming in force of Hindu Woman’s Right to Property Act, 1937 leaving behind his widow and two

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sons. The claim was made that the share of widow be inherited by her own son and not by stepson. But the court held that as the original owner died prior to the coming of the Act of 1937, so property should be devolved upon son and stepson equally.

**Class II Heirs**

If there is no heir in class I, means no daughter, son and husband and the children of predeceased son or daughter then property will go to the heirs of husband.\(^{194}\)

**Illustration:** Suppose a Hindu female died leaving behind no heir of class I but a brother, a sister and a son of a predeceased brother of her husband, the property will devolve among them if the property is inherited by the deceased female from the husband or in-laws.

\[
\begin{align*}
(B) & \quad S_{1/3} & \quad (P) & \quad B_{1/3} \\
\downarrow & & & \\
S_{1/3} & & & \\
\end{align*}
\]

**Illustration:** Suppose a Hindu female died leaving behind no heir of class I and II the property will devolve upon the father and mother if inherited from parents. They will take simultaneously.

\[
\begin{align*}
M_{1/2} & \quad F_{1/2} \\
\downarrow & & \\
(P) & & \\
\end{align*}
\]

\(^{194}\)Keshri v Har Prasad (1971) M.P. 129.
In Chatro v Sahayak Chakbandi Meerut, the question came before the Supreme Court that who would inherit the land of a widow landholder dying intestate survived by only daughter? The woman purchased the land in the lifetime of husband. The husband possessed some part of the land, as tenant, after his death the widow repossessed as proprietor holder. On the death of widow, the brother of husband claimed that widow had succeeded the tenancy so her right would not get the benefit of section 14, but Supreme Court held that in the absence of son the only daughter will inherit the property.

From the decision of the above case we have inferred that the Zamindari Abolition Act will apply only when husband died leaving behind the agricultural land and only daughter as an heir. But where a female holder of an agricultural land died leaving behind a daughter as an heir then she will inherit the land as an heir and Uttar Pradesh Zamindari Abolition and Tenancy Act will not apply.

The heir of the husband mentioned in section 15 means the heirs who would have succeeded under the Act if the husband had died just moment next after the females death.

Class III Heirs

The father and mother will entitle to inherit the property if there is no child, child of predeceased children, husband and husband’s heir. If both parents alive they would inherit simultaneously. The father and mother

\[^{195}\text{AIR (1997) SC 1702}\]
\[^{196}\text{Gopikabai v Bajya (1971) M.P.L.J. 335.}\]
mean the natural father and mother and not step parents\textsuperscript{197} or putative father.

**Class IV Heirs**

The property will devolve if there is no heir in first three categories.

Sub sec. (2) says that if there is no child and no child of predeceased children or husband, or mother or father, and then the property will go to one, from whom it is inherited. As if the property is inherited from the husband or father in law then it will go to the heirs of the husband. If it is inherited from the parents then it would revert back, first to the heir of father then to the heirs of mothers.

**Class V Heirs**

If the property comes through the natal family of the female and there is no heir in classes I, II, III and IV, then the property will devolve, among the heirs of mothers. If the number of heirs is more than one, of equal degree relation, then they will take simultaneously.\textsuperscript{198} An unmarried Hindu female died issueless leaving behind her, a brother and a widow sister in law. She inherits the property in question from her mother. Brother’s claim to be only heir excluding widow (sister in law) as being the last heir of his father was not approved by the court. The court held that widow had an equal share in the property.\textsuperscript{199} But where the female has

\textsuperscript{197} Anhio v Bajnath (1974) Pat. 177.

\textsuperscript{198} Mallapa v Shivappa (1962) Mys. 140.

\textsuperscript{199} Yogindra Prakash Duggal v Om Prakash Duggal (2000) AIHC 2905 (Del.)
inherited the property from her brother then this property will be governed by the rules of sec 15(a) of the Act.\textsuperscript{200}

**Section 15**

Sub section (2) of section 15 says that:

"Notwithstanding any thing contained in sub section (1)

- Any property inherited by a female Hindu from her father or Mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and-

- Any property inherited by a female Hindu from her husband or from father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

Section 15(2)(b) is engrafted to prevent the person from inheritance who is not even remotely related to the person, whose property is in question. This section ensure that the property of a Hindu female in the absence of children and children of predeceased children and husband and even parents always revert to the heirs of real owner from whom the property is inherited.\textsuperscript{201} If the property is allowed to be drifted away from

\textsuperscript{200} Bala Sahab v Jamila, AIR (1978) Bom. 44
the source, which is more important for the purpose of devolution of her property, the object of section 15 (2) will be defeated.\textsuperscript{202}

The object of section 15(2) is to ensure that the property left by a Hindu female does not lose the real source from which the deceased female had inherited the property. If there is no children of a Hindu female from the husband from whom she inherited the property but from second husband she had children they would not entitle to inherit the property. In fact the Hindu Succession Bill, 1954, when originally introduced in the Rajya Sabha did not contain any clause corresponding to Sub Section (2) of Section 15. It comes to be incorporated on the recommendation of joint Committee of the two houses of the Parliament.\textsuperscript{203}

Section 15 (2)(a) says that if a Hindu female leaves behind no heir of entry 1, 2, & 3 then the property will devolve upon the heirs of her father or mother if inherited from the natal family and does not go to the heirs of husband. Section 15(2)(b) says that if the property inherited from husband or father in law then in similar circumstances it will devolve among the heir of husband.\textsuperscript{204}

In \textit{Vijay Singh v Dy. Director Consolidation}\textsuperscript{205} the apex court has recognized the absolute ownership of widow, who was in possession of property when the Act came into force, consequently, it was held that on her death intestate her only daughter would become full owner of property as class I heir.

\textsuperscript{203} (2001) 252 ITR 324.
\textsuperscript{204} Mahesh Kumar Pate v Mahesh Kumar Vyas (2000) AIHC 485.
\textsuperscript{205} AIR (1996) SC 855.
At another place the mother became an absolute owner by virtue of section 14 of the Act, of the property, which she has inherited from her husband. It was held that it be devolved upon the son and daughter under the provision of section 15 (1)(a) and not under any other provision of law. To ascertain that who will be the heir of a Hindu female under category (b) of section 15 (1) the time of the wife’s death be considered instead of husband because the succession opens only at the time of her death. In a case property inherited by a wife from her second husband which become her absolute property. The widow made a will in favour of her son from the first husband. The heirs of her second husband made the claim. The court in this case held that the property will be devolved according to the will of the widow. In this instant case the court does not apply the provision of sub section (2) of Section 15 of Hindu Succession Act 1956 and give preference to the will of the deceased. It is submitted that by this decision court has defeated the object of sub-section (2) of section 15.

A very different type of case came to the court. The facts of the case were that one Yamuna Bai had 7 (seven) daughters. One of them was widowed at very early age and lived with her mother over twenty years. She had got nothing from her late husband. In such circumstances, Yamuna Devi had executed a will in favour of her widow daughter excluding all other daughters, which were challenged by the daughters. It was held by the court that testator and all daughters would get equal share

206 Debahari Kumbhar v Sribasta Patra, AIR (1994) Ori. 86.
208 Chintaram Rushibai (2000) AIHC 1308 M.P.
and the widowed daughter would be entitled to the 1/8 share of her mother in addition of her own share\(^{209}\) It is a case of natural love and affection.

Sub (2) is restricted only to the inheritance and does not deal the property acquired by any other means as through will gift or dowry. Though it is difficult to say why Parliament has restricted its application to the inherited property only, whether dowry and gifts received by a female are not property inherited from the father and husband.\(^{210}\) It was held where the identity of the property was changed sub (2) would not apply.\(^{211}\)

**The Order and Manner of Distribution**

Section 16 is technical and explains the order of succession and manners of distribution among the heirs of a female Hindu. It talks about the simultaneous succession and support the rule of representation. It prescribed three rules:-

**Rule 1:** Among the heirs specified in sub-section (1) of section 15 those in entry one, shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

**Rule 2:** If any son or daughter of intestate had pre deceased, the intestate leaving his or her own children alive at the time of intestate's death, the children of such son or daughter shall take between them, the share which such son or daughter would have taken, if living at the intestate's death.

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\(^{211}\) Veera Ragva Amma v Subba Rao (1976) AP. 337.
Rule 3: The devolution of the property of the intestate on the heirs referred to, in clauses (b),(d) and (e) of sub-section (1) and in sub-section (2) to section 15, shall be in the same order and according to the same rules as would have applied, if the property had been the father's or mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

The heirs of the father or the husband will be determined according to section 8. The heirs of the mother will be determined according to section 15 of the Hindu Succession Act, 1956. The heirs of mother, father or husband who are entitled to inherit the property of a Hindu female according to section 15, are actually the heirs of Hindu female herself and not of the person through whom the heirship is traced. In Shankarappa v Gauramma it was held that where a Hindu female inheriting the property of her parents jointly with her sister, died childless and intestate leaving behind a sister and the son of the predeceased sister, the surviving sister will take ¾ share of the property held jointly and the son of the predeceased sister ¼.

Some General Principles

Sections 18, 19, 20, 21, and 22 talks about the general principle of the succession which are as follows –

Preference of Full Blood over Half Blood

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212 (1971) 3 SCC 847.
213 (1973) Mys. 142.
Section 18 Says that the heir who is relative to the deceased by full blood will be preferred in comparison of half blood, if the nature of the relationship is the same in every other respect. In section 18 the legislative intent is to codify the earlier rule of Hindu Law preferring relations of full blood to half blood. It is a substantial reproduction of the previous rules.

Mode of Succession of Two or More Heirs

Section 19 says that if there are two or more heirs they will succeed together as per capita and as a tenant in common. But if a man dies leaving behind three children by a predeceased daughter and four children by a predeceased son, the property will be divided half and half. Here the property will be divided as per stripes. If there are two widows, they both will succeed together as tenants in common and if any one of them die then her share will not pass to her co sharer but to her own heirs.

Unborn Child

Section 20 talks about the right of the child in the womb. In law he deemed to be present at the death of the intestate Hindu. It does not confine to the children of deceased or predeceased son but to any person who is otherwise entitled. If the partitioned were done before his or her birth he or she will be entitled to reopen the partition. Section 20 extends to cases of illegitimate children entitled to claim.

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Simultaneous Death

If several deaths take place simultaneously, how the share will be decided, it is prescribed in section 21 of the Act. Because of the rule of survivorship this question is raised in simultaneous death that, who survived the other for the purpose of succession. Section 21 says that it will always be presumed that younger has survived the elder until the contrary is proved, when the matter is of relationship, age have no consideration but in general the younger in age be considered survived the elder. As where the mother and daughter, shot dead at the same time it will be presumed that daughter survived the mother.216

 Preferential Right

Section 22 is designed to give the benefit, to the heirs of deceased, to acquire the family property in preference of others. The intention of the legislature is to ensure that the property should remain within the family members rather than to go in the hands of stranger. Though this preferential right resembles to the right of preemption but in strict sense it is different. This right is only available to the class I heirs. Reversioners not belonging to class I heir have no preference over class II heir,217 This right extinguished if once the partition took place and specific shares have been allotted,218 because the intention of the legislature is not to put a clog on the power of alienation of independent owners of the properties.219 It is personal right neither heritable nor transferable.220

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Section 23 Before 2005

"The march of economic laws can be thwarted but not stopped for ever and the desire for self acquisition and freedom from the trammel of corporate life, ultimately established the institution of partition and separate ownership necessitated, the formulation of rules of inheritance applicable to property held in absolute sever ability by its own last owner."

Section 23 was considered one of the most discriminatory legislative actions, which discriminate only on the basis of sex. It was opposite to the constitutional provision of Art 15 (1), which says that there must not be any discrimination on the ground of sex. It was also a violative of fundamental right.

Section 23, “where a Hindu intesate has left surviving him or her both male and female heirs specified in class I of the schedule and his or her property includes a dwelling house wholly occupied by members of his or her family then not with standing any thing contained in this Act, the right of any such female heir to claim partition of dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein.”

Provided that where such female heir is daughter, she shall be entitle to a right of residence in dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

Said section says that where both male and female heirs of an intestate specified in class I of the schedule succeed. The female heir shall have no right to claim the partition of the dwelling house which is wholly occupied by the male but female heirs shall have the right to reside their till they are unmarried or deserted or widowed. This right to claim partition is
not extinguished forever but as soon as the male heirs choose to divide their respective share the female heirs also can claim partition. Section 23 was designed to preserve the heritage of a Hindu Jurisprudence\textsuperscript{221} which had considered the dwelling house as an impartible asset, and to prevent fragmentation it puts a rider\textsuperscript{222} on the absolute and equal enforcement of female’s right to claim partition. In the words of Raghavachariars “....to avoid confusion and chaos in the family created by the female whose moorings are elsewhere on account of their marriage, seeking to take away their shares and throw the male members into the streets....\textsuperscript{223}

Whatever may be the object and reason\textsuperscript{224} but it was discriminatory to oust the females from her lawful right merely because it was inconvenient for the male sharers.

Before going into the detail discussion of the provisions of section 23, it is necessary to know about the dwelling house. Dwelling house is not defined in the Act. The Supreme Court discusses it\textsuperscript{225} in Narasimha case. In this case the question before the court was that what is dwelling house? Whether it includes the building, which is partly occupied by members of the family, and other part is in possession of some stranger? The Gujrat High Court opined\textsuperscript{226}. That if the literal meaning is to be given to the section which says, “wholly occupied by members of the family” it ceases to be as dwelling house and section 23 will have no application in this case.

\textsuperscript{221} Mookammal v Chitra Vadi Ammal (1980) AIR Mad. 293.
\textsuperscript{223} The Leading case Narashimha Mury v Susheela Bai, AIR (1996) SC at 1831.
\textsuperscript{224} The Object and the analysis of Sec.23 was discussed by Patna High Court in Raghunathan v Rambalak, AIR (1964) Pat. 206 and Later on by Allahabad High Court in Katara v Smt.Hoshiari(1967)All L.J1031.
\textsuperscript{225} Supra
\textsuperscript{226} Vanitaben v Divaben, AIR (1979) Guj. 116
Another question, which need consideration, is that whether a tenanted house be considered as dwelling house? The apex court said that “In our considered view a tenanted house is not a dwelling house in the sense, the word is used in section 23”. The house ceases to be dwelling house if one of the brother parts with his share. By the majority opinion it was concluded by Supreme Court that the word dwelling house is neither a term of art nor it is synonymous of a residential house. To give the effect to the intention of the legislature who chooses the word dwelling house purposely – “status quo” should prevail as existing prior to his or her death.

In this case a Hindu intestate died, leaving behind a son and three daughters. The son has sold half part of the house to a stranger. In these circumstances the house was ceased to be a dwelling house because to constitute the dwelling house the actual, physical and mental (animus possendi) possession should present in the strict sense. The second question, which the second question which has been controversial for a long time is considered by the Supreme Court in this case was whether, restrict female to claim partition where there was only one male heir, is genuine?

Different views have been given by the different High courts through the passage of time. The arguments made by the courts, were generally in the favour that there should be no application of said section in the case of one male heir. As the object of the section 23 is frustrated where there is only one male member and it would be amounted as a complete denial of the female’s right because if there is only one male there is no possibility of
the male heir to choose to divide and the female is left at the whims and
caprice of their male counterpart. The supporter High courts was
Bombay, Karnata,b and Orrisa.

But contrary view was also given by High courts of Calcutta and
Madras. The Supreme Court put the controversies at rest. The apex
court by majority opinion said according to general clauses Act, 1897, the
language in plural would have to be read in singular also and where a
Hindu died intestate leaving behind a single male heir section 23 would
apply. It is submitted that the views of Supreme Court are not rightful and
harsh towards females.

An interesting question came before the court, for the consideration
whether a coparcener can resist the daughter's claim for partition? The
courts response is that section 23 clearly provides that it will apply only to
class I heir and the coparcener is not a class I heir.

In circumstances where the dwelling house is not in the possession
of the family members the bar of section 23 will not be applicable In
another case it was held that section 23 could not be extended to adjust
the interest of the parties in property without destroying the dwelling house
as a unit.

131 Mohanti Motyale v Oluru Appanama, AIR (1993) Ori. 36, Hemlata Devi v Umashankari, AIR (1975)
Ori. 908.
134 Supra . 225
135 Fulsing Ramsingh Rajput v Durgabai, AIR 91997) Bom. 201.
Section 23 After 2005

A very sound step has been taken by the legislature by abolishing section 23 of the principal Act, which was most unfair and discriminatory. Now the daughters have the right to claim the partition in the dwelling house. The provisions, which are critically examined in passing paragraphs, are self evident that how much hardship, they create for the females. The daughters were totally at the whim and caprice of the male members and had no right to claim partition even in great distress. It is a great relief for the women folk of the Hindu society. In Hindu Succession (Amendment) Bill, 2004, the Law Commission of India has recommended in its 174 report that section 23 which disentitle a female heir to ask for partition in respect of dwelling house should be abolished.\textsuperscript{238}

Heirs Not Entitled to Inherit?

The Act of 1956 barred certain persons from inheritance in certain condition. These disqualifications are laid down by the Act from section 24 to 28, which are as follows:

Remarried Widow After 2005

Section 24 of Hindu Succession Act disentitled certain widows from inheritance if they re-marry before the succession open. They were the widow of son, widow of predeceased son’s son and brother’s widow. But once succession opened and she inherited the property, she could not be divested from that property, by her subsequent marriage.\textsuperscript{239} Under the Hindu Woman Re-marriage Act, 1956, there was a provision that if widow

\textsuperscript{238} 174\textsuperscript{th} Law Commission Report para 1.18.
\textsuperscript{239} Bhuribai v Chamabai (1968) Raj. 139.
re-married even after the succession open, she would be divested from the property, she inherited from her husband. Subsequently this Act was repealed in, 1983. But where the marriage of widow took place prior to the coming into force of this Act and because of the old law the widow lost her right to inherit due to the second marriage, the provision of this section will not apply.240 Recently Supreme Court gave a significant judgement. In this case the widow remarried in 1953, which was a bigamous marriage and held void. The argument was given in favour of widow that void marriage did not attract the provision of section 2 of Hindu remarriage Act, Supreme Court said “voidness of marriage will not remove her disqualification to inherit.”241

A very irregular judgement was given recently by the Gauhati High court, which defeated the object of the Act. The facts of the case242 were that the deceased after divorcing her first wife married the plaintiff. After his death the plaintiff remarried. The court held that because of remarriage she had lost her chastity, so not entitled to any share. It is submitted that the case is wrongly decided because unchastity is no bar to inherit and section 24 applies only to the widow of son, son's son and brother's son and does not divest deceased's own widow.

**Note** : This controversial section 24 has now been abolished by the Hindu succession (Amendment) Act, 2005. Now remarriage is not a bar to inherit the property of her previous husband.

240 Sankar Prasad v Usha Bala, AIR (1978) Cal. 525.
Murderer

Section 25 disqualified the person who causes the murder of the deceased, from inheriting the property of the murdered who by either way commit the murder or abate.. or help in the furtherance of the murder. For the application of this section, the term murderer, should be liberally construed and not in the strict sense as defined in section 300 of IPC.\(^{243}\) This section will apply to disqualify the person only and not his heirs.\(^{244}\)

Conversion

Section 26 disentitles the heirs of a converted person from inheriting the property of any of their Hindu relative. Because of the Caste Disability Removal Act the effect of conversion will not disentitle the person himself who is converted,\(^{245}\) section further says that if those heirs subsequently become Hindu the disqualification will be removed.

Disqualified Heir be Deemed Died

Section 27 confine to the person himself who by any reason is disqualified to inherit and does not affect the heir’s right of inheritance in any way. It says that it be deemed that the disqualified person is dead before the intestate deceased in whose property otherwise he has right to inherit.

Abolition of the Old Disqualification of Hindu Law

Section 28 has abolished other disqualification of old Hindu law, which disentitle the person suffering from some diseases, from inheritance

\(^{243}\) Indian Penal Code.
\(^{244}\) N. Seetharamiah v Ram Krishaniah, AIR (1970) A.P. 407.
\(^{245}\) Ashok Naidu v Raymond S. Mulu (1976), Cal. 272.
except those which are expressly mentioned in the above going sections of the Act. The unchastity of widow is no bar to inherit even though in the original Bill, the unchastity was suggested to retain.\textsuperscript{246} A Hindu was found to be a lunatic when succession opened. It was claimed that under the text lunancy must be congenital to exclude from inheritance. Under Hindu law lunancy is considered distinct from idiocy. It need not be congenital to exclude from inheritance, if it existed when succession opened.\textsuperscript{247}

Succinctly it can be said that there are so many anomalies in Hindu Succession Act, 1956 and it is not exempted from defects but at least it has improved, up to some extent the Hindu female’s property rights. The entire previous impediment’s, which were imposed upon the female’s right, are abolished now and she got absolute property right with full rights to appropriate it, in whatever manner she liked. In comparison of old Hindu law now she was in better position though not at best.

**Hindu Succession (Amendment) Act 2005**

After the fifty-eight years of Independence the 5\textsuperscript{th} September be remembered as a red-letter day in the Hindu Women’s World. As another progressive attempt has been made by the legislature for the economic and social empowerment of women folk. Hindu Succession Amendment Bill, 2004 was introduced in the on going winter session of Parliament drafted on the recommendation of the 174\textsuperscript{th} Report (May 2000) of the Law Commission. The Commission pointed out that the earlier law granted arbitrary and unfair benefits to the male heirs of a Hindu, died intestate. It suggests the equal distribution of ancestral property between both male

\textsuperscript{246} Clause (39) of The Hindu Code Bill 1954.
\textsuperscript{247} Parameshwari Thayaininah v Shri Subramanium, (1960) 2 SCR 729.
and female heirs. It demands equal treatment and equal partnership in economic and social sphere. The Rajya Sabha passed this Bill on 16th August 2005 and by Lok Sabha on 29th August 2005 and got President assent on 5th September 2005 and came into force on 9th September 2005. It really gives a deathblow to the old Hindu law in which the females were even devoid of any property rights.

By this amendment Act of 2005 many sections of Hindu Succession Act of 1956 are repealed or altered which were unfair towards females. Now the Hindu daughter of Mitakshara joint family will also be born with a silver spoon in her mouth. Now the daughter has all the rights and liabilities, which her brother has. She is a coparcener and there will be no notional partition, she is entitle to claim the partition in dwelling house as section 23 which previously disentitle the female to claim partition is omitted by this amendment Act. Four new heirs are included by this Act in Schedule of the principal Act. Among newly introduced heirs in class I, there are three females and one male. Section 24, which put a bar to inherit the property on a widow who remarries, is also been abolished by the new Act. Now she is entitled to inherit the property of her previous husband. It can be said that the new Act is a total commitment for the women empowerment and protection of her property rights. Now it is turned of judiciary to implement it and give flesh and breath to these laws.

**Christian Law**

With the establishment of British political authority in India, so many reforms have been made governing the family problems of the Indians though it is said that the Britishers had no interference in the family matters and their respective personal laws had governed these matters. But it is
not absolutely true because so many family laws were passed by the English Rulers as Parsi Marriage And Divorce Act, 1865, The Indian Succession Act, 1865, Indian Divorce Act, 1869, Hindu Wills Act, 1870, and Christian Marriage Act, 1872 etc.

The British rule in India began on the legislative front with the Indian Succession Act, 1865 and Parsi Succession Act, 1865. These were based on English Law and was declared, to constitute subject, to certain exceptions, be applicable to all classes of intestate and testamentary succession. These exceptions were so wide that exclude all natives of India,\(^{248}\) such as Hindus, Muslims, Sikhs, Jains etc., as they were very sentimental about their religions. This law is applicable only to European, Indians-Christians, Jews, and Parsis etc.

**Indian Christian**

- Indian Christian means a native of India.\(^{249}\)
- who is of unmixed Asiatic descent.
- who in good faith claims to be of unmixed Asiatic descent.
- who profess any form of the Christian religion.\(^{250}\)

This definition is taken from the Native Christian Act, 1901. But there, in the place of "Native Christian" the words "Indian Christian" are used. Native Christians are those who were converted Christian whom the

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\(^{248}\) Ilbert: Government of India, 3\(^{rd}\)ed. p. 36.
\(^{249}\) Section 2 clause (d) Indian Succession Act. 1925.
\(^{250}\) Ma Khun v Ma Ahma, 12 Rang. 184.
Britishers regarded as their faithful slaves. An Anglo Indian does not come with in the definition under clause (d).

Application of the Act

The Act empowers the State Government to exclude any community from the operations of certain sections, which are expressly mentioned in section, 3 of the Indian Succession Act, 1925. That are generally related to the domicile, marriage, intestate and testamentary succession etc. As section, 4 exempt the Hindus, Muslims, Buddhists, Sikhs and Jains from the operation of section, 4 to 19. But under section 21 of the Special Marriage Act, 1954, the Act will apply to those whose marriage is solemnized under Special Marriage Act, irrespective of their religion.

General Principles of the Succession of the Christian

Under section 5 of The Indian Succession Act, 1925, two different sets of rules were made to regulate the succession of movable and immovable property of a Christian deceased.

Movable property includes standing timber, growing crops, grass, fruits upon and juice in, the tree and property of every description except immovable property.

Immovable property means things attached to the earth, as lands, trees, buildings etc., but it does not include standing timber, growing crops or grass etc.

251 Mehmood Tahir: op cit, p. 99.
253 Kashiba v Stripat 19 Bom. 697.
254 General Clauses Act X of 1897.
255 Ibid.
Sub (1) of section 5 says that the succession of the immovable property of the person, be governed by the law of the land, where the deceased had his domicile at the time of his death.

Illustration: Suppose, Mr. X having his domiciled in India but he dies in France, leaving some movable property in France and England, and both movable and immovable in India.

The succession of the whole property is to be regulated by the law of India but the status, of the parties, is to be decided by the law of the domicile. In the case where the deceased left both movable and immovable property, sub section (2) of section, 5 says that it will be regulated by the laws of the country in which the person, whose property is in question to be governed, domiciled all the time till his death.

Illustration: Suppose Mr. X an English man, having his domicile in France, dies in India leaving behind both movable and immovable property in India. In this case the succession to movable is regulated by rules of France and the succession of immovable by the law of India.

Rules Regarding Domicile

The word domicile is not defined in the Indian Succession Act, 1925. In Halsbury’s laws of England the word domicile is defined as “A person is domiciled in that country in which he either has or is deemed by law to have his permanent home.” Dicey and Morris has defined domicile as, “a

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256 Ratan Shaw v Bamoji, 40 Bom. L.R. 141.
257 See the illustration no 2 of Sec. 5 of Indian Succession Act, 1925.
person is in general domiciled in the country in which he is considered by English law to have his permanent home.\textsuperscript{259}

The Indian Succession Act laid down from 6 to 19 some rules, 1925, about the domicile of the deceased, which are as follows:

- If a person has more than one domicile the place where he lives with his family be considered his permanent home to regulate the succession.\textsuperscript{260} (Sec.6).
- Unless the new domicile is acquired, the domicile of the Birth prevails.\textsuperscript{261}

Traders or Merchant

A, a person whose domicile of origin is in England, proceeds to India where he settles as a merchant, intending to reside here to the rest of the life. His domicile is now in India.\textsuperscript{262}

Foreign Representatives

But there is an exception in the case of the representatives of the foreign government and their family. Though they permanently resides in foreign country with family but because they have no intention to change their domicile, be considered the domicile of that government, from where they came to represent.\textsuperscript{263}

\textsuperscript{259} Morris : op cit p. 100.
\textsuperscript{260} Somervi]le v Somervi]le S. Ves 758.
\textsuperscript{261} Sec. 9 of Indian Succession Act, 1925.
\textsuperscript{262} See the Illustration of Sec. 10.
\textsuperscript{263} Sec. 12 of Indian Succession Act, 1925.
Children Legitimate and Illegitimate

In the case of children, the domicile of the legitimate child be ascertained, by the domicile of his father, at the time of his birth and in case of illegitimate child according to his or her mother's domicile. In the case of posthumous child, his or her domiciled be considered in that country where his or her father domiciled till death.

Illustration: Suppose at the time of the birth of A, his father was domiciled in England. The domicile of A be considered in England though he himself was born in France if A is a legitimate child.

Illustration: Suppose at the birth of B, an illegitimate child, his putative father was domiciled in England but his mother domiciled in France B's domicile will be considered in France.

- A lunatic person cannot acquire a new domicile.

- If the domicile of the dead is not known and not proved the domicile of another place and he dies leaving movable property in India the succession will be governed by the Indian Law.

The Effect of Marriage to Regulate the Succession

Section, 15 says that by marriage a woman acquires the domicile of her husband, if she had not the same domicile before. Section, 16 says that during the continuance of marriage the wife's domicile follows that of her husband, therefore if a woman in India possessing movable property, marries to a person whose domicile is in England, on her death husband

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264 Sec. 7, 8 of Indian Succession Act, 1925.
265 Sec. 18 of Indian Succession Act, 1925.
266 Sec. 19 of Indian Succession Act, 1925.
267 Miller v Administrative General I Cal. 412.
be entitled to inherit her whole movable property to exclude the children according to English law.

Exception: The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.

Abolition of the English Concept of Marital Property

By the Indian Succession Act of 1925, the English concept of marital property was totally abolished. In English law there was a rule that on marriage the property of female was merged in that of husband's property and she was no longer, authorized to enjoy it in whatever manner she like, though with the approval of husband she was entitled to appropriate it.

Section, 20 of the said Act of 1925 provides that, "no person shall by marriage, acquire any interest in the property of other spouse and the other spouse will not lose, his or her right to appropriate his or her own property which he or she could have done if unmarried."

Exception: But the provision of this section would not be applied if any one of the spouses professed Hindu, Islam, and Buddhist or Jain religion at the time of marriage.\(^\text{268}\)

Different Domiciled of Spouses

According to section, 21 if there is a different domiciled of the spouses neither party shall acquire by marriage any rights in respect of any property of the other spouse which is not comprised in a settlement made previous to the marriage.

\(^{268}\) Sub. Section (2)(b) of section 20 of Indian Succession Act, 1925.
Intestate Succession

If there is no will or testamentary document left by the Indian Christian deceased to dispose of his property, the succession of the property be regulated according to the rules of the Indian Succession Act, 1925.

Heirs

The Indian Succession Act, 1925, chooses the heirs on the basis of consanguinity and placed them into three categories:

- Husband and wife
- Lineal ascendants and descendants
- Collaterals

The relationship is decided according to the consanguinity, which is of two types lineal consanguinity and collateral consanguinity.\(^{269}\) In lineal consanguinity two persons are connected in one straight line whether descendants or ascendants.\(^{270}\) A straight line does not connect collateral consanguinity,\(^{271}\) but they are descendants from the same stock or ancestor. Though there is no consanguinity between husband and wife,\(^{272}\) but they are heir of each other. It is an exception of the general rule of succession based on consanguinity.

Section 27 abolishes the distinction between cognate and agnate between half and full blood, between the posthumous and normal child. All are equally entitled to succeed.

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\(^{269}\) Sec. 24 of Indian Succession Act, 1925.
\(^{270}\) Sec. 25 of Indian Succession Act 1925.
\(^{271}\) Sec. 26 of Indian Succession Act, 1925.
\(^{272}\) Administrator General v Simpson 26 Mad. 532.
Illustration: A Christian widow has a daughter B by her first husband. A remarries and have two sons C and D by second husband. B dies intestate and unmarried leaving property. The property will be divided equally between A, C, and D.

\[
\begin{array}{c}
(P) \quad \text{A}_{1/3} \text{(widow)} \\
\text{(daughter from first husband)}
\end{array}
\]

\[
(B)^d \quad \text{C}_{1/3}^{S} \quad \text{D}_{1/3}^{S} \text{(C, D sons of second husband)}
\]

Widow or Widower

There is no difference to the rules regulating the succession of widow or widower both has same rights.

- If there is widow and lineal descendants.
  - 1/3 will go to the widow or widower as the case may be
  - 2/3 will go to the lineal descendants

Illustration: Suppose a Christian intestate died leaving behind a widow, a son and daughter, the share of widow will be 1/3 and son and daughter will inherit 1/3 each from the 2/3 shares of descendants. If they be more they will inherit from the 2/3 and the widow’s share will not be reduced from 1/3.

\[
\begin{array}{c}
(A) \quad \text{W}_{1/3} \\
\text{S}_{1/3} \quad \text{D}_{1/3}
\end{array}
\]

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273 Jessopp v Watson 1 M & K 665.
274 Sec. 33 (a) with Sec. 35.
• If there is widow and collateral and no lineal descendant.\(^{275}\)
  
  • \(\frac{1}{2}\) will go to widow or widower.
  
  • \(\frac{1}{2}\) to collaterals, if one or more they will share from the \(\frac{1}{2}\) share allotted to collaterals.

**Illustration:** Suppose, A, died leaving behind widow, a sister and a brother and there is no lineal descendant.

\[
\begin{array}{c}
\text{B}_{1/4} \\
\text{S}_{1/4} \\
\text{(P)} \\
\text{W}_{1/2}
\end{array}
\]

(\(\frac{1}{2}\) collectively collateral)

• If there is only widow or widower and no lineal descendants and no collaterals.\(^{276}\)
  
  • The whole property will go to widow or widower

• If there is no widow or widower, no lineal descendants and no collaterals then
  
  • the whole property will go to the Government.\(^{277}\)

**Judicial Separation**

In case of judicial separation no one is entitled to inherit each other and they presumed to be dead for the purpose of succession.\(^{278}\) Under the

\(^{275}\) Sec. 33 (b) with Sec. 35.

\(^{276}\) Sec. 33 (c) with Sec. 35.

\(^{277}\) Sec. 34 of Indian Succession Act, 1925.

\(^{278}\) Sec. 24 of Indian Divorce Act, 1925.
Travancore Succession Act if the mother or the widow become entitled to any immovable property then they have only a life interest, which is terminable on death or remarriage.279

**Lineal Descendants**

The lineal descendants consist of children, grand children, great grand children and remoter lineal descendants. The lineal descendants are divided into three classes—

- lineal descendant of first degree,
- lineal descendant of second degree,
- lineal descendant of third degree remoter.

**Lineal Descendants of First Degree**

Lineal descendants of first degree are the children of the deceased himself or herself. They take equally and there would be no difference between son and daughter. The child does not include the illegitimate child280 and the adopted child.281

If there is no surviving spouse and deceased has left only a child or children but no more remote lineal descendants through a deceased child, the property shall go to his surviving child or children. If they are more than one they will inherit equally irrespective of sex.282

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279 F.D. Devadasson : Christian law in India 319.
280 In the Goods of Sarah Ezra, AIR (1931) C. 560.
281 Ma Khun v Ma Ahma, 12 Rang. 184.
282 Sec. 37 of Indian Succession Act, 1925.

155
Illustration: Suppose A died leaving behind a son and two daughters they will inherit equally

\[
\begin{array}{c}
(P) \\
\hline \\
S_{1/3} \quad D_{1/3} \quad D_{1/3}
\end{array}
\]

Lineal Descendants of Second Degree

The grand children of the deceased are considered as the second degree of lineal descendants. If the deceased has not left the surviving spouse and no children but has left grand children and no descendant of grand children, then whole property is shared equally. Under English law then property be divided as per stripe not as per capita.\textsuperscript{283}

Illustration: A has two sons B and C both died in the life time of A, leaving behind one daughter from C and two sons from B. After the death of A the property will go to all three grandchildren equally as per capita.

English Law

\[
\begin{array}{c}
(A) \\
\hline \\
(B) \\
S_{1/4} \quad S_{1/4} \quad D_{1/2}
\end{array}
\]

Indian Law

\[
\begin{array}{c}
(A) \\
\hline \\
(B) \\
S_{1/3} \quad S_{1/3} \quad D_{1/3}
\end{array}
\]

\textsuperscript{283} Sec. 38 of Indian Succession Act, 1925.
Remoter Lineal Descendants of Third Degree

If there are only great grand children and other remote descendants of same degree, they will inherit equally.\(^{284}\)

Where Lineal Descendants are not of Same Degree

If the deceased left many lineal descendants who are not of same degree then the property is distributed per stripes.\(^{285}\) According to the rule of representation they all will inherit the share of their parents for which they would have been entitled if they had survived the intestate.

Illustration: A Christian died leaving behind four children of a predeceased son and one son of a predeceased daughter and one son of his own. The property will be divided into three equal shares then 1/3 share of the predeceased be divided among the four children of the predeceased son equally – the other 1/3 will go to the son of predeceased daughter and the other 1/3 be inherited by the deceased own son.\(^{286}\)

\[^{284}\text{Sec. 39 of Indian Succession Act, 1925}\]
\[^{285}\text{Sec. 40 of Indian Succession Act, 1925.}\]
\[^{286}\text{See the Illustration of Sec. 40}\]
Illustration: If a Christian left no child of his own but four children of a predeceased daughter and four children of a predeceased son and three children of predeceased son's son. In this case the property will be distributed into nine equal share from which $1/9$ will go to each grand child and the remaining $1/9$ will be divided among the three great grand children equally.

```
A
  (D)       (S)       (S)
  S_1/9     S_1/9     S_1/9
  D_1/9     D_1/9     D_1/9
  S_1/9     S_1/9     S_1/9
  D_1/27    D_1/27    D_1/27
```

Illustration: A died leaving behind, three children of a predeceased son, two children of a predeceased son's son, one child of his predeceased daughter and one son of his own. In this case $1/3$ share will go to his own son, the other $1/3$ be divided among the three children of a predeceased son and two children of a predeceased son's son and the other $1/3$ will go to the son of his predeceased daughter.
Illustration: A died leaving a daughter and a pregnant wife of a predeceased son. Subsequently a son is born to the pregnant wife of a predeceased son. In this case property will be divided equally among these two surviving heirs.

Where there is no Lineal Descendants

If there is no lineal descendants but surviving spouse the property be distributed to the rules laid down in sections 42 to 48 of the Act.\(^\text{287}\)

\(^{287}\) Sec. 41 of Indian Succession Act 1925.
Chapter -III

Father

According to the provision of section, 42 of the Act of 1925. If the intestate leaves father and widow or widower, then father will take $\frac{1}{2}$ and other half will go to widow or widower as the case may be. If there is no surviving spouse then father will inherit the whole property. Father excludes any other kindred. But in case there is son and father though both are of equal degree kindred the father will be excluded by the son.

According to the provision of section, 42 of the Act of 1925-

- If the intestate leaves father and widow or widower then father will take $\frac{1}{2}$ and other $\frac{1}{2}$ will go to the widow or widower as the case may be.

\[ F_{1/2} \]

\[ \begin{array}{c}
    (A) \\
    W_{1/2}
\end{array} \]

- If there is no surviving spouse but distant kindred the father will inherit the whole excluding the distant kindred.

\[ F_{\text{whole property}} \]

\[ \begin{array}{c}
    (A) \\
    D.K. (excluded by father)
\end{array} \]

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288 Sec. 42 of Indian Succession Act, 1925.

289 Administrator General v Anandochari, 9. Mad. 466.
Chapter -III

- If there is no son and father though both of them are equal degree kindred but the father will be excluded by the son and whole property will go to son.

\[
\begin{align*}
F & \quad \text{excluded by son} \\
(A) & \\
S & \quad \text{Whole property}
\end{align*}
\]

No Father but Mother, Brother and Sister

Section, 43 says about the situation, if the deceased is survived only by mother, brother and sister and there is no child of any deceased brother or sister, Father is also dead then the property be distributed among mother, brother and sister equally. Stepmother is not included as mother but uterine sister is treated as a full sister.

Illustration: A died leaving behind his mother and two brothers and a stepsister the property be divided into four equal part and each one will inherit \(\frac{1}{4}\) share.

\[
\begin{align*}
M_{1/4} & \\
(A) & \\
B_{1/4} & \quad B_{1/4} \quad S'S_{1/4} \quad \text{(Step Sister)}
\end{align*}
\]

\(^{290}\) Rutland v Rutland, 2 P. Wms. 216.

\(^{291}\) See, the Illustration of Sec. 43.
No Father but Mother, Brother and Sister and the Children of Deceased Brother or Sister

In such a situation where the intestate is survived by mother, two brothers and a child of her deceased sister and two children of deceased step brother but no father then the property be divided into five equal shares. 1/5 will go to mother, 1/5 to one brother, 1/5 to another brother, 1/5 to the child of deceased sister and the remaining 1/5 be divided equally among the two children of deceased bother 1/10 each. Here the rule of representation will apply. 

No Father but Mother and Children of Deceased Brother or Sister

If there is no father, brother and sister survived. Only mother and children of deceased brother and sister living then the children of deceased brother or sister will be entitled, to the share of his father or mother according to the rule of representation.

Illustration: A dies leaving behind mother and child of his deceased sister and two children of his deceased brother. The property will be divided into three equal share 1/3 will go to mother, 1/3 to the child of

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292 Sec. 44 of Indian Succession Act, 1925.
deceased sister and remaining 1/3 is to be inherited by the sons of the deceased brother collectively,\(^{293}\) means 1/6 by each son.

\[
\begin{align*}
M_{1/3} & \quad \quad \quad (P) \quad \quad \quad (A) \quad \quad \quad (B) \\
S_{1/3} & \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad S_{1/6} \quad \quad \quad \quad D_{1/6}
\end{align*}
\]

No Father, Brother, Sister, Nephew or Nice but Mother

If mother survives the deceased only and by no one else of first and second degree of lineal descendant then the whole property will go to mother.\(^{294}\)

No Parents and Lineal Descendants but Grand Parents, Brother and Sister and Children of Brother and Sister

In case the deceased is survived by grandfather, brother, sister and children of predeceased brother and sister. The children of predeceased brother or sister are entitled to the share of their respective parents.\(^{295}\)

Illustration: A died leaving behind grandfather and two sister, one brother and three children of his deceased sister. The property will be divided into four equal shares. ¼ will go to brother, ¼ will go to each sister and ¼ will go to the children of deceased which they will share equally and grand father will get nothing because he is excluded by brothers and sisters.

\(^{292}\) Sec. 45, see the Illustration also.
\(^{294}\) Sec. 46 of Indian Succession Act, 925.
\(^{295}\) Sec. 47 of Indian Succession Act, 1925.
No Parents, no Lineal Descendants and no Brother and Sisters

In a situation where parent's brother and sisters do not survive the deceased and also there are no lineal descendants the property will go to the relatives of same degree and they will share equally.\(^\text{296}\)

Illustration: A died leaving behind grand father, and grand mother and relative of the same degree then both the grand parents will inherit equally if there is uncle and aunt also they will be excluded by the grand parents because uncle and aunts are the relative of third degree.\(^\text{297}\)

\(^{296}\) Sec. 48 of Indian Succession Act, 1925.
\(^{297}\) See the Illustration of Sec. 48.
In second situation if great grand parents and uncles and aunts survive the deceased then because they all are of third degree relatives will inherit equally.  

\[
\begin{array}{c}
\text{GGF}_{1/4} \\
\text{(GP)} \\
\text{F} \\
\text{U}_{1/4} & \text{A}_{1/4} \\
\text{P}
\end{array}
\]

Doctrine of Escheat

If there is no one to inherit as no widow, lineal descendants or ascendants and distant kindered then whole property will go to the government.

In case of nun

There is no provision, which restrict a nun from the inheritance either in religion or in Statutes. If his wife survives a Christian male, son and daughters one of who is nun the court held it that nun is eligible to inherit the property of her father.

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298 Ibid.
299 Secretary of State v Girdharilal, 54 All 226.
300 G.K. Kempegowda v Lucinda, AIR (1985) Kant. 231.
Travancore Christian Succession Act & The Cochin Succession Act.

The Indian Succession Acts which governs the succession of the property of Indian Christian was extended to the State of Travancore and Cochin by the State (Laws) Act 1951. The above mentioned Acts were highly discriminatory, which govern the Christians of Kerala Supreme Court held that, all Indian Christians be governed by the Indian Succession Act of 1925.

Recently in *Land Board v Cyriac Thomas*, Supreme Court has reaffirmed his earlier decision. The facts of the case were that Kerala Land Reforms Act made a provision that the person who had more land than a specified limit, will have to surrender the excess land to the government. A man had more land but he claimed that this belonged to his sister. The government claimed that under Travancore Christian Succession Act, daughter’s share is limited to Rs. 5000/- only and she can not inherit the land of her father but Supreme Court held that after the death of Christian father the sons and daughters have succeed the property equally according to the provision of Indian Succession Act, 1925.

Christian law of succession is a codified law. Though it is no more a religious law even in Christian dominated States. It is not much discriminatory towards women. The old concept of marital property is no more in existence in this codified law and females have got absolute property right with independent right to appropriate it, in what ever manner they like.

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301 This aspect is remedied by the case of Mary Roy v State of Kerala (1986) 2 SCC, 209
Parsi Law

It is one of the most important and best-known religions of pre-Islamic era. It took its name from that of its founder Zorathushtra (Zoroaster). The roots of the Zoroastrianism can be located in an Eastern Iranian tribal area and basically pastoral society. The religion originated around 1000 BCE and developed further, under the Persian Empire. The problems of evil and suffering was basic to Zoroastrian thought and the urgent human necessity of providing an answer to the problem was reconciled with an abiding faith in the dignity and freedom of humanity by means of belief, in the so called myth of choice. The famous codes are "The Syrian Law Books" and "The Zorastrian Madigni – Hazar Dadastan."

The word ‘Parsi’ is originated from the word ‘pars’ or ‘fars’ a province in Persia from which the original Persian emigrants came to Indian subcontinent. The expression Parsi has no religious connotation. It carries a more territorial connotation. The religion of every Parsi is Zoroastrian but it’s not necessary that every Zoroastrian be a Parsi. For example, an Iranian who is registered as a foreigner and who is not domiciled in India but follows the Zoroastrian, is not a Parsi with in the meaning of the Act and the Parsi Matrimonial Court has no jurisdiction over him.

The Parsi Marriage and Divorce Act III of 1936 as “Parsi Zoroastrian” have defined the word “Parsi”. That cannot be confined to Indian Parsi
Zoroastrian but extended to include the Zoroastrian of Iran also and that the court constituted under the Act has jurisdiction over them.  

The Succession of Parsees

After the passing of the Indian Succession Act, 1925, the succession of the property of a Parsi was governed by the Act of 1925. There are special rules regulating the succession of a Parsi intestate in sections 50 to 56 of the Act of 1925.

Before the passing of the Act of 1925, the Indian Parsees were governed by the English common law in maters of succession because of the claiming of the English law of primogeniture by a Parsi. The Parsee Chattels Real Act of 1837, was passed by which the Parsees to a great extent were excluded from the operation of the English law. But the English Statute of Distribution governed the intestate succession. The Parsees were not satisfied with that, so they wanted their separate laws of inheritance because they do not want to be exploited by the laws of England, where wife had no power over her own property. With the result of their struggle Parsis Intestate Succession Act, 1865, was passed which introduced the widow and daughter as heir and entitled them to inherit the property. Before that they were only entitled for the maintenance. But mother and sister were not made the heirs and they were incapable to inherit.

Beside all these Acts that worked for the Parsees till 1925, the rules governing the Parsees in the Act of 1925, are totally based on previous Act of 1865. The present provision of the Act of 1925, relating to the

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succession of the Parsis was passed through various amendments\textsuperscript{307} and judicial decisions.\textsuperscript{308} In 1939, drastic changes were made that the widow of predeceased lineal descendants were also introduced as heir and the widower were excluded from the list of the heirs.

**General Principles of Intestate Succession of a Parsi**

The *Indian Succession Act of 1925* laid down some general principles. From sections 50 to 56 deals with the principles regulating the intestate succession of a Parsi. Drastic changes were introduced by the amendment Act of 1991, in the governing rules of Parsi intestate succession.

**Posthumous Child**

Clause (a) of Section 50 abolished the difference between the posthumous child and the child born in the lifetime of father. In the matter of succession both are equally treated.\textsuperscript{309} Though before 1939, there were different rules.

**Predeceased Child**

If a lineal descendant of a Parsi intestate has predeceased him then his or her share would be lapsed into two conditions.\textsuperscript{310}

- If he has left no widow or widower, or
- If he has left no lineal descendant of such predeceased child.

\textsuperscript{307} Indian Succession Amendment Act, 1939, Act 51 of 1991.
\textsuperscript{308} Ratan Shaw v Bamaji 40, Bom. L.R. 141.
\textsuperscript{309} Manchaerji v Mithabai 1 Bom. 506.
\textsuperscript{310} Clause (b) of Sec. 50.
Prior 1991 there was another condition, which was abolished now that if he has left no widow or widower of any lineal descendants.

Remarriage

In the case a widow or widower remarry in the lifetime of the intestate then he or she will not be entitled to inherit and be deemed non-existent. The word widower is inserted by the Act of 1991. Previously this provision was only for the widows. The widower of a predeceased daughter was held entitle to share even he had remarried.

Distribution of Property among Widow, Widower Children and Parents

If a widow or widower and children survive a Parsi, they will take equal share. This section was very discriminatory when introduced in 1925, towards woman. Prior to the amendment of 1939, the widow's share was half the share of the son but by the Act of 1939 it was made equal to the share of the son, and the daughters share was \( \frac{1}{4} \) share of the son. It was made \( \frac{1}{2} \) by the amendment Act of 1939, but by the amendment Act of 1991, all sex-based discrimination had been resolved, now they all entitle to equal share.

Illustration: Suppose a Parsi died leaving behind widow, son and daughter they all inherit equal share.

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311 Clause (c) of sec. 50
312 Jehangir v Pirojbai 11 Bom. 1.
313 Sec. 51, 11 (a)
In second situation if there is no widow or widower and only children irrespective of sex they will inherit equally.\textsuperscript{314} Prior to 1939 the share of the daughter was $\frac{1}{4}$ of the son, which was made of $\frac{1}{2}$ and now by the Act of 1991 equal to the son.

**Illustration:** Suppose a Parsi died leaving behind only a son and two daughter and no widow, each will take $\frac{1}{3}$.

In third situation if the one or both parents survive a Parsi and there is also a widow or widower and children, the share of each parent be $\frac{1}{2}$ of the share of each child.\textsuperscript{315} The share of the parents was introduced by the Act of 1939 but at that time the father’s share was $\frac{1}{2}$ of the son and mother’s share was $\frac{1}{2}$ of the daughter. The stepparents were not included in the word ‘parent’ in the Act.\textsuperscript{316}

\textsuperscript{314} Clause (b) of Sub. Sec. (1) of Sec. 51.
\textsuperscript{315} Sub. (2) of Sec. 51
\textsuperscript{316} Rutland v Rutland 2 p. Wms. 216.
Illustration: Suppose an intestate Parsi dies leaving behind parents, widow, son and daughter. The share of the parents will be half of the child rest heirs will inherit equally.

\[
\begin{array}{c}
F_{1/8} \\
\hline
(P) \\
\hline
S_{1/4}
\end{array}
\quad \begin{array}{c}
M_{1/8} \\
\hline
W_{1/4} \\
\hline
D_{1/4}
\end{array}
\]

Section 52 was repealed by the Act of 1991, which prior to the amendment dealt with the succession of the property of the female Parsi because like Hindu Law there was two different sets of rules governing the estate of male and female.

Distribution of Share of predeceased Child of Intestate Leaving lineal Descendants.

- If any Parsi died leaving behind the lineal descendants of a pre-deceased child, the share, of that predeceased child, will be that share, for which, he was entitled if surviving at the death of the intestate Parsi and that share will go to his or her lineal descendants according to the rules. The rule of representation will apply here.

317 Sec. 53 of Indian Succession Act, 1925.
Clause (a) says if that deceased child is son and leaves behind his widow and children then the share of that child will be distributed among them equally.

Illustration: Suppose a Parsi died leaving behind his son, daughter and predeceased son's widow, son and daughter. At first the property will be divided into three equal shares: one share will go to son, one to daughter and the remaining 1/3 will be distributed among the heirs of the predeceased son.

There is a proviso attached with clause (a) of section 53, which says about another situation in which that predeceased child has left no lineal descendant but a widow or widower of his lineal descendants. Then she or he will be entitled of 1/3 of the property.

Clause (b) says about another situation, in which the deceased child was a daughter her share be divided, among her children equally. In this clause, the widower is excluded from the inheritance. It is difficult to say, why there is contrast between two sections as 50 and the provision of this section in

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318 According to the provision of this chapter.
319 Supra note 309.
that section the widower is included as heir\textsuperscript{320} even he remarried\textsuperscript{321}

In condition where the child of such predeceased also died in the lifetime of intestate his or her share will be ascertained and dispose of according to the provision of clause (a) and (b).\textsuperscript{322}

If any remoter lineal descendants of the intestate died in the life time of intestate his or her share be ascertained as if he or she is living at the time of the intestate death and his or her share be distributed among his or her heirs.\textsuperscript{323}

Before going in to detailed study of the provisions of sections 54 and 55 it is necessary to know the heirs mentioned in schedule II part I of section 54 and part II of section 55.

The Heirs of the Deceased

Schedule II

(Part I (Section 54)

- Father and mother.
- Brother and sister and lineal descendants of them as shall have predeceased the intestate. Other than half brother and sister.
- Paternal and maternal grand parents.

\textsuperscript{320} Clause (b) of Sec. 50.
\textsuperscript{321} Supra note 312.
\textsuperscript{322} Clause (c) of Sec. 53.
\textsuperscript{323} Clause (d) of Sec. 53.
• Children of paternal and maternal grand parents and the lineal descendants of such of them as have predeceased the intestate.
• Paternal and maternal grandparent's parents.
• Paternal and maternal grandparent's parents children and the lineal descendants of such of them as have predeceased the intestate.

Part II Section 55

• Father and Mother.
• Brother and Sister and lineal descendants of them as shall have predeceased the intestate. Other than half brother and sister.
• Paternal and maternal grand parents
• Children of paternal and maternal grand parents and the lineal descendants of such of them as have predeceased the intestate.
• Paternal and maternal grandparent's parents.
• Paternal and maternal grandparent's parents children and the lineal descendants of such of them as have predeceased the intestate.
• Half brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.
• Widows of brothers or half brothers and widower of sisters or half sisters.
• Paternal or maternal grandparents children's widows or widowers.
• Widows or widowers of deceased lineal descendants of the intestate who have not remarried before the death of the intestate.
If there is no Lineal Descendant but a Widow or Widower or a Widow of any Lineal Descendant

If there is no lineal descendant but only widow or widower his or her share\textsuperscript{324} would be $\frac{1}{2}$, the other half would go to the relatives mentioned above according to the order specified. The next kin would be preferred to those preferred in second and so on.\textsuperscript{325}

Illustration: Suppose a Parsi died leaving behind a widow, a brother and a sister but no lineal descendant the half will go to widow and other half will be equally distributed among brother and sister.

\[ \text{\textbf{S}}_{\frac{1}{4}} \quad \text{\textbf{B}}_{\frac{1}{4}} \quad \text{\textbf{(P)}} \quad \text{\textbf{W}}_{\frac{1}{4}} \]

If there is a widow or widower of an intestate and also widow or widower of lineal descendants then the share of his or her widow or widower be $\frac{1}{3}$ and $\frac{1}{3}$ will go to the lineal widow or widower and the other $\frac{1}{3}$ will go to the relatives,\textsuperscript{326} but if there is more lineal widow or widower they will inherit $\frac{1}{3}$ collectively.

Illustration: Suppose a Parsi dies leaving behind widow, sister, brother and a widow of pre-deceased son the property will be divided into three equal part $\frac{1}{3}$ will go to each widow and $\frac{1}{3}$ will be distributed among sister and brother.

\textsuperscript{324} Clause (a) of Sec. 54.
\textsuperscript{325} Clause (d) of Sec. 54.
\textsuperscript{326} Clause (b) with (d) of Sec. 54.
If there is only one widow or widower of lineal descendant she or he will take 1/3 but if no widow or widower of intestate and there is more than one lineal descendant's widow or widowers then 2/3 will go to them which be distributed equally among them the other 1/3 will go to the relatives.\footnote{Clause (c) with (d) of Sec. 54.}

Illustration: Suppose A dies leaving behind brother, sister, widow of his pre-deceased son and widower of her pre-deceased daughter. The brother and sister will take 1/3 collectively it means 1/6 each; the other 2/3 will be inherited by the widow and widower collectively.

After deducting the share of widow or widower of all description the residue property will be distributed among the relatives according to rule of nearer exclude the remote one. The share will be equal irrespective of sex among the same degree of propinquity.
If there are no relatives then the whole of the residue shall be distributed in proportion to the share specified among them, like Islamic law the rule of Return prevail, in Parsi law also.

If there is no Lineal Descendants nor a Widow nor Widower nor a Widow of any Lineal Descendant.

If a Parsi dies leaving behind no lineal descendant nor a widow or widower nor a widow or widower of lineal descendant then his or her next of kin be entitle to inherit the property according to the order mentioned. The rule apply here will be the nearness of blood to relation to the intestate. The agnate will be first exhausted then cognate if there is neither agnate nor cognate then the widow or widower of brother and sister will be entitled.

The Relatives who are not Otherwise Entitled to Inherit

If there is no above mentioned heir then the property will be divided, among the relatives who are not otherwise entitled to inherit according to the above mentioned provisions. The rule nearer will exclude the remote one be applied.

This is the whole law of inheritance of a Parsi who died intestate. But there are different rules, which govern the testamentary succession of a Parsi. The whole law of Parsi, intestate succession passed through revolutionary changes. The Parsi was much exploited in the British period by governing their succession according to the rules of common law. After a long struggle, the Act of 1865 was passed. That was also too much discriminatory towards females. Though some important amendments were made in 1939 but it can be said that after the amendment of 1991 it is evident that the female of Parsi got their due share.
The Parsi law recognized the rule of representation and the nearer exclude the remote one. Like Muslim Law it also recognized the Doctrine of Return. Now if any discrimination seems in succession that is the share of parents is half of the child but it cannot be said that it is discriminatory in any form because the parents have no responsibility.

Lastly, it is inferred from the above discussion that by the amendment of 1991 in the rules governing the Parsi intestate succession provided under Indian Succession Act of 1925 is not discriminatory towards females.