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Sections 41 to 48 of the Indian Succession Act, 1925 – Proposed Reforms

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12nd September, 2014

Dear Mr. Ravi Shankar Prasad ji,

I am presenting to you Two Hundred and Forty-Seventh Report of the Law Commission on **"Sections 41 to 48 of the Indian Succession Act 1925 – Proposed Reforms".**

A plain reading of provisions built in sections 42 to 46 of the Indian Succession Act, 1925 reveal how the scheme envisioned therein incorporates a preferential approach towards men and is unfair and unjust towards Christian women.

A number of representations from various Christian Organisations were addressed to the Government and to the respective Union Law Ministers in last few years inviting attention of the Government on the issue. These representations were referred by the Ministry of Law & Justice to the Commission for its suggestion.

Therefore, these provisions have been closely examined and needed changes have been suggested in the report, I submit to you.

With warm regards,

Yours sincerely,

A.P. Shah

[Ajit Prakash Shah]

Mr. Ravi Shankar Prasad
Hon'ble Minister for Law and Justice
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At a Glance

REPORT

Sections 41 to 48 of the Indian Succession Act, 1925 –Proposed Reforms

Introduction

Christianity is the third most populous religion in India. Indian Christians, though united in the essence of their faith, are diverse in their practices, rites and religion across the country. Though uniformity among the Roman Catholic Church is more or less maintained, the indigenous influence has made Christianity in India unique and different from its form in many other countries across the World. Almost all varieties of Christianity are believed to reside in India though the most common groups are from the Roman Catholic Church, Syro-Malabar Catholic Church, the Protestant Churches like the Church of South India, the Marthoma Syrian Church, the Presbyterian Church of India and so on. During early period Christianity was considered to be a foreign reception and imposition in Indian context. However, with the passage of time Indian Christianity has become integral part of Indian culture itself and has come to be understood as an indigenous appropriation of Christian experience and not a foreign implant.[1]

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[1] Selva J Raj, Corrine Dempsey, POPULAR CHRISTIANITY IN INDIA: RITING BETWEEN THE LINES, 2002, p. 3.

Therefore, as result of above the family law governing Christians in India is varied. Synergetic influences have led to cultural variations that have gained legal recognition either statutorily or judicially. This has led to multiplicity in application of laws whereas ambiguity most noticeable is in the laws of succession for Christians. It is this multiplicity and ambiguity that led to enactment of the Indian Succession Act, 1865 and finally the Indian Succession Act, 1925.

Developments leading to enactment of Indian Succession Act, 1925

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

However, considerable uncertainty prevailed in the period before 1865 about the law applicable in case of persons belonging to communities other than Hindus and Muslims. Before 1865, the Hindus and Muslims were governed by their respective personal laws, in matters of inheritance and succession. But the position was obscure in relation to other persons – for example, Anglo-Indians, Parsis, Jews, Armenians, Christians, and others. In general the English law was applied in the Presidency towns, but the position as regards the Moffusil was not very clear. It is this prevalence of obscurity that was in fact, referred to by **Sir Henry Maine**, while introducing the Bill that led to the Succession Act of 1865. The law defining the rights and obligations of non-Hindus and non-Muslims was thus in extremely confused position. In the Presidency towns, the English Law was applied to members of just mentioned communities. Outside the presidency towns, most of the courts in the Mofussil came to apply under the phrase "Justice, equity and good conscience" in all cases not provided for by the legislature, the substantive personal law of the particular person. The **First Law Commission** in 1835, thus recommended that the English Law should be declared to be the law applicable to such persons - a recommendation that was not accepted. The

Second Law Commission of 1853 did not favour introduction of English Law, but it viewed it desirable to assimilate law as was prevailing throughout the country. However, the **Third Law Commission** submitted draft of the Indian Succession Act, 1865. Finally, came the Act of 1865. The Act, dealt with succession, both testamentary and intestate. The Act exempted Hindus and Muslims from its scope, but the utility of the Act lay in the codification of law of succession as regards other persons.

The Indian Succession Act, 1865 that was based on English law and was declared to constitute, subject to certain exceptions, the law of British India applicable to all classes of intestate and testamentary succession but the exceptions were so wide as to exclude all natives of India. A very important change was made by the Hindu Wills Act, 1870 (Act 21 of 1870), which *inter alia* enacted that certain portions of Indian Succession Act should apply to all Wills and codicils made by any Hindu on or after 1st day of September, 1870. The Probate and Administration Act 5 of 1881 was applied to Hindus and Muhammadans. [On the coming into force of the Hindu Succession Act, 1956, succession to property of a Hindu is governed by its provisions except to the extent excluded by Section 5 therein. Clause(1) of Section 5

relates to succession to property of Hindus whose marriage is solemnised under the Special Marriage Act, 1954, and to the property of the issue of such marriage. Clauses (ii) and (iii) of the Section relate to impartible property held by the persons specified therein. Succession to the properties of all such persons is regulated by the Indian Succession Act, 1925.] The British Parliament felt that in the face of such vast scatteredness and multiplicity as described above there was need for consolidation of law. And thus mainly responding to this need that the British legislatives enacted Indian Succession Act, 1925, - primarily a consolidating Act.

Indian Succession Act, 1925

Today the Indian Succession Act, 1925 is the principal legislative measure in India dealing with the substantive law of testamentary succession in regard to persons other than Muslims and intestate succession in regard to persons other than Hindus and Muslims. It is also the principal legislative measure dealing with machinery of succession in regard to the testamentary and intestate succession in respect of such persons. In fact, it needs to be underscored that the Act of 1925 as already mentioned is a consolidating Act. It is only an amending

Act and has only consolidated several pre-existing Central Acts passed between 1841 and 1903 without introducing any material changes. In fact, the framers of the Act stated thus- "The subject of this bill is to consolidate the Indian Law relating to succession; the separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it. The bill has been prepared by the Statute Law Revision Committee as purely consolidating measure. No intentional change of law has therefore been made."[2] The sweep of this Act is wide as it consolidates twelve Acts into one. The Acts consolidated or repealed are:-

i. The Succession (Property Protection) Act, 19 of 1841
ii. The Indian Succession Act, 10 of 1925
iii. The Parsi Intestate Succession Act, 21 of 1865
iv. The Hindu Wills Act, 21 of 1870
v. The Married Women's Property Act, 3 of the 1874, Section 2
vi. Probate and Administration Act, 5 of 1881; Act 6 of 1889; Act 2 of 1890 and Act 8 of 1903
vii. The District Delegates Act, 6 of 1881
viii. The Succession Certificate Act, 7 of 1889

[2] Statement of objects and reasons vide Gazette of India (page 5), dated 4th August, 1923

ix. The Native Christian Administration of Estates Act, 7 of 1901

Scheme of the Act – The Succession Act broadly divides succession into intestate and testamentary succession. While the provisions of the Act relating to intestate succession are applicable to particular classes or communities of people leaving the personal law, statutory and otherwise of the two major communities in India, namely Hindus and Muslims, untouched. The provisions of the Act dealing with testamentary succession are generally made applicable to everyone in India except those exempted under the Act and a few others.

The Act has been divided into eleven parts and some of the parts have been sub-divided into chapters. Part-I relates to preliminary dealing with definitions and power of the State Government to exempt certain classes of persons from the operation of the Act. Part-II lays down the law relating to domicile. The concept is of importance, because the application of the Act to movable property of a person depends thereon. However, this part, does not apply if the deceased was a Hindu, Muhammadan, Budhist, Sikh or Jaina. Part-III states the effect of marriage on the rights of succession.

Part-IV treats of the concept of consanguinity – against a concept of importance for the purposes of intestate succession. Part-V enacts the provisions relating to the intestate succession. It deals with the order of intestate succession. As the present work largely involves issues of intestate succession, Part-V of the Act constitutes the main concern of the work that follows. Part-VI, which is the longest part of the Act and comprises twenty-three chapters and deals with testamentary succession though, may constitute the most important portion of the Act, though not very relevant from the perspective of present study. However, continuing about the general scheme of the Act, Part-VII deals with the protection of the property of the deceased and Part-VIII with representative title to the property of the deceased. Part-IX relates to probate, letter of administration and administration of the assets of the deceased and Part-X regulates the grant of succession certificate.

Scheme of Sections 41-48 - Unfair and Unjust to Christian Mother

To bring to focus the issue of the present study; **How Sections 41 to 48 (Sections 42 to 46 to be more specific) of the Indian Succession Act, 1925 are unfair to the interest of Christian Women and what changes in this regard could be suggested'** a closer look at the provisions of Part V is needed. It is with this part of the Act begins the provisions actually dealing with the order

of intestate succession. Part-V does not apply to any intestacy occurring before the 1st January, 1866, or to the property of any Hindu, Mohammadan, Buddhist, Sikh or Jaina.

Chapter I (Sections 29 & 30) of this part of the Act is preliminary while Chapter II (Sections 31 to 49) deals with 'Rules in cases of Intestates other than Parsis' and Chapter III (Sections 50-56) contains special rules for Parsis intestates.

It is Chapter II dealing with rules in cases of intestate other than Parsis that forms the primary concern of the present report. Chapter II of part-V of the Act has been divided into three sub-parts. Sections 31 to 35 forming a sub-part provide rules in cases of intestate other than Parsis, while Sections 36 to 40 forming another sub-part deal with 'rules regarding distribution where there are lineal descendants' of the intestate. **Another sub-part of this Chapter of the Act 'running from Sections 41 to 49 provides rules regarding distribution where there 'are no lineal descendants' of the intestate**.

It is in context of provisions contained in Sections 41 to 49 it has been contended that these provisions are

unfair towards Christian Women. The concern has been raised by many including number of Christian organizations. A number of memorandums and representations expressing their concerns were addressed to the Government and to the Union Law Minister at different times in the past few years. In turn the Ministry of Law & Justice referred these representations to the Law Commission for its suggestions. The Commission thus undertook study on the subject sometime in the year 2012. In this interim and recently one of former Consultants formerly engaged by the Commission, Shri Kanda Rao, Advocate, A.P. High Court circulated a document on the subject with a copy marked to the Commission. The Commission felt that keeping in view the background and importance of the subject it needs to give serious thoughts to the subject and prepare a short report. Thus finally the present report is submitted to Ministry of Law & Justice, Government of India, for its consideration.

Suggestions & Recommenda-tions

The report has mainly focused around provisions contained in Sections 41 to 49 and examined as to whether these provisions are just and fair towards women or these are discriminatory against them? If discriminatory – what reforms could be suggested.

Section 41 provides that rules of distribution where the intestate has left no lineal descendants shall be contained in Sections 42 to 48, "after deducting the widow's share if he has left a widow." A simple reading of provisions built in Sections 42 to 46 would reveal how the scheme envisioned therein is unfair and unjust. According to Section 42, where deceased intestate father is living and there are no lineal descendants, father succeeds to property and mother gets no share. Preferential approach is writ large.

Further, even in case where the deceased intestate's father does not survive, provisions of Section 43 requires mother to equally share with brothers or sisters of the intestate, rather being entitled to what her husband (i.e. deceased intestate's father) was entitled to many calling such provisions 'unfair'. Unfairness runs through provisions of Sections 44 and 45 as well, and it is only when neither father, brother, sister or their children of the deceased intestate are living that the property goes to the mother under Section 46 – a situation to a great extent created by forces of divine circumstances. The Law Commission in its earlier report (110th) - "Indian Succession Act, 1925" reflecting on these provisions have thus noted: "This is not in conformity with the current thinking as to status of women. The law is in need of

reform on this point". With this background in view the Commission believes that the need to reform is not only timely but becomes more glaring when one looks around and finds that in many other jurisdictions the law on the point is more sensitive and egalitarian. Say for example in England law is different. There under provisions of Section 46 of the Administration of Estates Act, 1925 even where brothers and sisters of the intestate are alive, the father and mother take the property. And more relevant in our context is to note that they share equally, and if only one of them survives he or she takes the whole.

Foregoing leads us to conclude that the law envisioned under Sections 41 to 49 deserve change so as to protect interest of Christian women, especially in case of mother of deceased intestate. It is suggested that provisions of Section 42 which weaves an archaic principle of giving superior status to man in access and owning property needs to be revised. One of the recommendations thus made in this report is to amend provisions of Section 42 so as to ensure that deceased intestate (leaving apart the half for the deceased's widow if living) succeed the property in equal. Such change would constitute a positive step in ensuring that the law is fair and just towards Christian women.

Accordingly this would lead to revisiting provisions of Section 43 so as to ensure that where either of the parents (father or mother) of the deceased intestate is living, he or she as the case may be, shall succeed the property even if deceased's brothers and sisters as envisioned in existing provisions of Section 43 are surviving. (Position in this regard has further been clarified in the chart to follow that epicts both the existing provisions and amended ones). Such change is in conformity with our rejection of the approach in existing provisions not only in Section 43 that does not treat mother of the deceased intestate as having status equal to the father but running all through provisions of Sections 44, 45 and 46 as well. Accordingly, in our approach provisions incorporated in Sections 44, 45 and 46 too have been revisited and revised, as could be seen from the chart given below. Coming to Sections 47 and 48 we reiterate what has earlier been recommended by the Law Commission in its 110th report. As regards Section 47 it was noted there that provisions of this Section does not apply until there is at least one brother or sister alive and same be clarified by adding, after the words "nor mother" as appearing in the text of this Section, the words "but has left a brother or a sister". The position clarifying this has been shown in the chart. Section 48 incorporates distribution per capita approach

where there are no brothers or sisters, but only children of brothers and sisters. It has been rightly pointed out that distribution per capita may be satisfactory as a general rule, but even unjust in case of children of brothers and sisters and, therefore, it be amended to provide that the succession should be per stirpes in such cases. The accident of the death of one issue should not affect the share of his or her decedents. The revised position has been epicted in the chart.

Chart Epicting Changes/ Amendments as Recommended

THE INDIAN SUCCESSION ACT, 1925

CHAPTER – II

	Existing Sections	Proposed Amendments
	The Indian Succession Act 1925 (Sections 41-49)	**The Indian Succession (Amendment) Act 2014**
Section 41	**Rules of distribution where intestate has left no lineal descendants-** Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in Sections 42 to 48.	As it is
Section 42	**Where intestate's father living-** If the intestate's father is living, he shall succeed to the property.	**Where intestate's parents (father and mother) living-** If the intestate's parents (father and mother) are living, they shall succeed the property equally.
Section 43	**Where intestate's father dead, but his mother, brothers and sisters living-** If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares. **Illustration**	**Where either of intestate's parents is dead-** If either of the intestate's parents is dead, the other parent shall succeed to the property. **Illustration** A dies intestate, survived by either father or mother, the surviving parent as the case may be shall take the entire property.

	A dies intestate, survived by his mother and two brothers of the full blood, John and Henry, and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one-fourth, each brother takes one-fourth and Mary, the sister of half blood, takes one-fourth.	
Section 44	**Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister living-** If the intestate's father is dead but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death. **Illustration** A, the intestate, leaves his mother, his brothers, John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not	**Where intestate's father and mother are dead and his brother or sister, and children of any deceased brother or sister living-** If the intestate's father and mother are dead but if any of the intestate's brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death. **Illustration** A, the intestate, leaves his brothers, John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son

	of his mother. The mother takes one-fifth, John and Henry each takes one-fifth, the child of Mary takes one-fifth, and the two children of George divide the remaining one-fifth equally between them.	of his father but not of his mother. John and Henry each takes one-fourth, the child of Mary takes one-fourth, and the two children of George divide the remaining one-fourth equally between them.
Section 45	**Where intestate's father dead and his mother and children of any deceased brother or sister living-** If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death. **Illustration** A, the intestate, leaves no brother or sister but leaves his mother and one child of deceased sister, Mary and two children of deceased brother George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.	**Where intestate's father and mother are dead and the children of any deceased brother or sister living-** If the intestate's father and mother are dead, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death. **Illustration** A, the intestate, leaves no brother or sister but one child of deceased sister, Mary and two children of deceased brother George. The child of Mary takes one-half, and the two children of George divide the remaining one-half equally between them.

Section 46	**Where intestate's father dead, but his mother living and no brother, sister, nephew or niece**- If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.	**May be omitted (as consequence of changed provisions of amended Section 43)**
Section 47	**Where intestate has left neither lineal descendant, nor father, nor mother-** Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.	Where the intestate has left neither lineal descendant, nor father, nor mother, but has left a brother or a sister, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may have died before them, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.
Section 48	**Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister-** Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him. **Illustrations** (i) A, the intestate, has left a grandfather, and a	Where the intestate has left neither lineal descendant nor parents, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him. *Explanation – Where such relatives are children of brothers or sisters of the intestate, they shall take stirpes.* **Illustrations**

	grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.	(i) A, the intestate, has left a grandfather, and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.
	(ii) A, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.	(ii) A, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.
	(iii) A, the intestate, left a great-grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.	(iii) A, the intestate, left a great-grandfather, an uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.
	(iv) Ten children of one brother or sister of the intestate and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree of kindred to him. They will each take one-eleventh of the property.	*(iv)* Two children of one brother or sister of the intestate and one child of another brother or sister of the intestate,

		constitute the class of relatives of the nearest degree of hindered to him. Half of the property shall be shared by two children in equal shares and the remaining half shall go to one child of another brother or sister. To be more specific two children of one brother or sister of the intestate shall take one-fourth each while one child of another brother or sister of the intestate shall take half of the property. (No doubt it may sound at little at unease, but the accident of the death of one issue should not affect the share of his or her descendants. Even in Section 47 where there are brothers or sisters and also children of brother and sisters the succession is per stirpes. There appears to be no justification for having a different rule under Section 48, at least where the persons entitled are children of brother and sisters).
Section 49	**Children's advancements not brought into hotchpot-** Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child, of such person, no money or other property which the intestate may, during his life, have paid, given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in	As it is

	estimating such distributive share.	

The Commission believes above suggested changes if meet legislative approval would go a long way in bringing law in consonance with time and in addressing concerns of Christian community and those aired in various representations and memorandums made to the Ministry of Law & Justice, Government of India and referred to it.

Conclusion

Institutions of 'succession', no doubt is primarily connected with property, but it equally serves 'a variety' of values cherished by a free society. These include reinforcement of family ties and responsibilities economic and social pluralism. As pointed out by the Commission in its earlier report (110^{th}) that at more fundamental level the institution of succession is a proper response of the society to elemental motives ranging from concerns for one's immediate family to a desire to extend one's personality far beyond death and established patterns of inheritance may be the least objectionable means of deciding the ownership of property on a person's death. However, it be not overlooked that transfer of substantial wealth tend to conflict with basic social values, including equality of

opportunity, dispersal of economic power and avoidance of rigid class distinctions. Tested on the last parameter as just identified the existing provisions in Sections 42 to 46 of Indian Succession Act are archaic in nature and foster an approach that solidify distinctions based on gender and thus prejudicial and unfair to status of women and Christian mother of deceased intestate in present context. Changes suggested would make law more reflective of rising social awareness in Christian community and of needs of changing times.

(Justice A.P. Shah)
Chairman

(Justice S.N. Kapoor) **Member**	**(Prof. (Dr.) Moolchand Sharma)** **Member**	**(Justice Usha Mehra)** **Member**
(Dr. S.S. Chahar) **Member-Secretary**	**(P.K. Malhotra)** **Ex-officio Member**	**(Dr.Sanjay Singh)** **Ex-officio Member**