THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY
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M.G.R. Main Road, Perungudi, Chennai - 600 096.

FAMILY LAW - II

FIRST YEAR – SECOND SEMESTER

STUDY MATERIAL

By

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MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr. P. Vanangamudi
Vice-Chancellor

PREFACE

In Family Law I , the students would have learnt the various personal laws relating to marriage and divorce, adoption , maintenance and guardianship. The multiplicity of diverse Family Laws, some of which are codified while others are un codified, makes it a vast area of study. The students should first know the basic concepts of family system, specially the un codified concepts of Hindu Law so as to understand and appreciate the codified laws.

From the students point of view this study material contains the basic concepts underlying Family Law II. It deals with laws relating to the Hindu joint family, devolution of ancestral property , intestate succession to the separate property of a Hindu, Muslim and Christian and testamentary succession. The rules relating to devolution of property in the family is important due to the sensitive bond of kindred. An equitable and fair balance of rights and duties are displayed in the laws and its practical implementation through judicial decisions are made.

Students would definitely show interest in learning this fascinating subject particularly in our country, where Family Laws differ from community to community. A study of the Family Laws of all the communities helps us to know the laws relating to each one of them, their diversities , similarities and paradoxes .An attempt is made in this work to enlighten students about presenting relevant answers effectively. I could not fathom the depth of the subject in this work, so I appeal to the students not to restrict themselves with this material but to use it a guiding light and endeavour to read more so as to get a clear and in depth knowledge of the subject. Wishing them all the very best.

I am deeply grateful to our Tamil Nadu Dr. Ambedkar Law University for its encouragement and guidance in completing this course material.

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FAMILY LAW - II

UNIT I

HINDU JOINT FAMILY

Joint family is a unique institution under the Hindu law. It has been the fundamental aspect of the life of Hindus. For a Hindu , there is no escape from a joint family. Its origin can be traced to the patriarchal system where the patriarch or the head of the family was the unquestioned ruler, laying down norms for the members of the family to follow. The ancient system generally treated the property acquired by the members of the family as family property or joint property and the family members had a right over it.

It consists of a common male ancestor, his mother, wife, unmarried daughters, all male lineal descendant and their wives or widows. A daughter ceases to be a member of her father's joint family on her marriage and may regains her status if she becomes a widow or on being deserted by her husband and she comes to stay in her father's house permanently. A child male or female born in the family can cease to be a member of the family if he or she is given in adoption to another family. Since adoption is an irrevocable act the child can never become a member of this family again in future .

The head or the manager of such joint family is called Karta. A common male ancestor is necessary to bring the joint family into existence, but is not necessary for its continuation. Joint family is purely a creature of law and cannot be made by agreement. A single member cannot make a joint family. Members are added either by birth, marriage or by adoption. The death of the common ancestor does not mean that the joint family comes to an end. Upper links are removed and lower are added and so long as the line does not become extinct, the joint family continues and can continue indefinitely.
Incidents of Hindu Joint family:

- A Hindu family is purely a creature of law. This means it cannot be created by the act of the members or an agreement between the parties
- The Hindu family has no legal entity distinct or separate from its members. It cannot sue or being sued in its own name. It is neither a juristic person nor a corporation and therefore cannot convey property in its joint character.
- All members in the family do not have equal rights in the family property. Coparceners have an interest in the coparcenary property while other members only have a right of residence and maintenance .
- Plurality of members is necessary for the continuation of the joint family but plurality of male members is not necessary for its continuation.
- Every Hindu family is presumed ti be a joint family. The presumption is that the members are living in a state of oneness, unless contrary is proved.
- There is no presumption that the joint family possess joint property. Existences of property is not a condition precedent to the existence of joint family.

Karta:

The senior most male member in the joint family is called Karta. The father and in his absence the senior most male member is presumed to be the karta. This position is regulated by seniority and does not depend on the consent of the members of the family .So long as he is alive, he may be aged, infirm yet he is entittled to kartaship. The courts have clarified that though the settles principles of classical Hindu law remains that karta would be the senior most male member of the family. In the following circumstances a younger brother of the family can deal with the family property as karta;

a. If the senior member is not available;

b. Where the karta relinquishes his right expressly or by implication;

c. In absences of the manager in exceptional circumstances such as disaster or calamity affecting the whole family and for supporting the family;

d. In the absence of the father ;

He is the head and the manager of the joint family. He stands in a fiduciary relationship with the members of the family, but unlikely the trustee he is not accountable to the family generally. Where he misappropriates the joint family funds, he is accountable and will be called upon to refund the amount to the joint family corpus. The Karta's position is sui generis. It comes to him by being born in the family .The relationship between him and other members is not that of principal and agent or of patners. He is the master of the grand show of the joint family and all its affairs. He obtains no reward for his services . It is terminable by resignation and relinquishment but it is not indefeasible. The following are his powers and duties.

Powers:

1. Power to manage the family property and business.
2. Power to alienate joint family property.
3. Power to enter into contract.
4. Power to contract debts and to repay debts.
5. Power to make gift.
6. Power to settle disputes.

Power of management- He has absolute power of management .He may manage the family affairs the way he likes, has power to take possession of the total property and receive the joint family income. If a coparceners presence in the family proves a nuisance due to his disorderly behaviour or bad habits , the karta has powers to throw him out of the house. While taking decisions with respect to family members , the karta need not be equitable or even impartial.

Power of alienation of the joint family property- With respect to the joint family property the karta is entrusted with its management. However he does not own the property as a whole and if all the copaceners give their consent he can alienate the property and the alienation will be binding on interest of all the members of the family and the purpose of the transfer would be immaterial.

Vigneshwara specifies in Mitakshara, that the joint family property can be transferred in three cases:

a. Aptakale (emergency)

b. Kutumbathre (benefit of the family)

c. Dhramarthe (pious purpose)

The present categories authorising alienations as recognised by the courts are as follows:

a. Legal necessity.

b. Benefit of estate.

c. Performance of religious or an indispensable duty

Legal necessity- means any necessity that can be sustained in law or justified by law. For alienation to be valid under legal necessity ,the course of action taken by the karta should is such as an ordinary prudent man. Following are instances of legal necessity .

i. For providing food, clothing and shelter to the family members;
ii. For education of the family members;
iii. Performance of religious or an indispensable duty
iv. For general maintenance;
v. For defraying marriage expenses of children;
vi. Providing for medical treatment;
vii. For payments of debts due to the family
viii. Payment of government revenue.

Benefit of the estate: 'Benefit' means an advantage , betterment or profit. 'estate' refers to the joint family landed property. So a transaction which brings an advantage to the property of the family would be covered under the expression ' benefit of the estate'. what amounts to benefit would be depend on the facts and circumstances of each case.

Performance of religious or an indispensable duty: The Dharmashastras provide for elaborate rituals to be performed on various occasions in a man's life . Joint family property can be alienated by the karta for the performance of indispensable religious and charitable duties, for example shraddha of an ancestor.

Power to contract debt: The karta has power to contract debt for any lawful purpose and such debt binds the share of all the coparceners. A coparcener even after seeking partition cannot escape the liability of the debt from his share of the property.

Power of representation: Karta has power to represent the family in all social ,legal, religious and revenue matters. The joint family acts through the karta. A suit will filed in the court by the family in the name of the karta and a suit be filed against the family will be defended by him.

Antecedent debt: A debt , the payment of which permits the father to sell the joint family property ,must be an antecedent debt. 'antecedent' means prior in time and an antecedent debt means a debt that is prior in time to the present alienation of the property by the father. Two conditions are necessary to bind the entire joint family properties viz;

1. The debt should be an antecedent one
2. It should not have been incurred for an immoral or illegal purpose.

Thus a loan taken to repay the loss incurred in gambling cannot be further repaid by the alienation of the joint family property, so as to bind the shares of all the joint family members.

Duties:

1. Maintain all the members of the family.
2. He must represent his family.
3. It his duty to perform marriage of all unmarried members.
4. Liable to give accounts (only at the time of partition).
5. Pay taxes and other dues on behalf of the family.

Pious Obligation of the Son: Under the Hindu law there is a special emphasis on the payment of one's debt, as necessary for the salvation of the soul. Due to the belief of rebirth, it is said that even though a man dies, the soul carries the deeds and the burden of the debt into the next life. It was the duty of the putras (son, son's son and son's son' s son) to liberate him from the burden of debts. Therefore, the obligation of the sons to pay the debts of the father is religious and important for according spiritual

benefit to the departed father. Since the payment of debt was a spiritual duty, the purpose of which it was contracted becomes important.

Avyavaharika Debts - Debts contracted for purposes that could not be justified in accordance with religious tenets or a person's dharma could not extend on the obligation on the son for its repayment. Debt incurred for immoral and illegal purpose (Avyavaharika debts) were not binding on the son. According to Virhaspathi son shall not be made to pay a debt incurred by father for liquor, for idle gifts, for promise made under the influence of love or wrath etc. Instances of Avyavaharika debts;

(a) Money borrowed for payment of fine inflicted for criminal offences;
(b) Loan taken by the father to meet his vices;
(c) Gambling debts.

After the passing of The Hindu Succession (Amendment) Act 2005, doctrine of pious obligation of the son stands amended. Pious obligation has been limited to debts contracted before the commencement of The Hindu Succession (Amendment) Act 2005.

Coparcenary :

Inside the joint family is a smaller unit called as coparcenary. It consists of a common male ancestor and his male descendants up to fourth generation (including the ancestor). They are called coparceners and they are owners of the joint family property. This group of persons unlike the joint family are related to each other only by blood or through a valid adoption. ,and it is a creation of law. Under the classical law, no female could be a member of a coparcenary. No person can by marriage and no stranger can by agreement become a member of the coparcenary. A single person cannot form a coparcenary ,there should be at least two male members to constitute it, On the death of one of the coparceners his property passes by survivorship to other coparceners. Coparcenary is illustrated in the following figures:

Fig.1

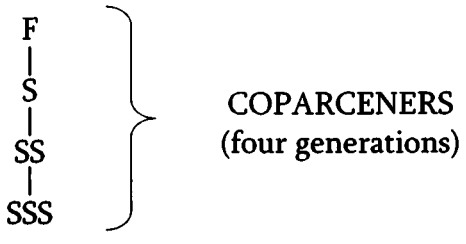
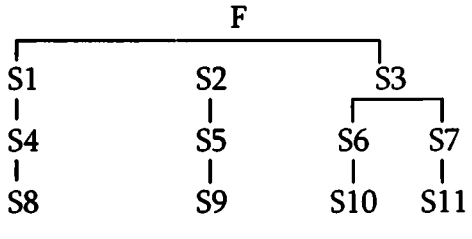


Fig.1.1

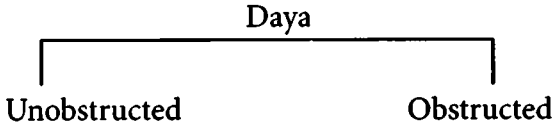


Coparcenary within a coparcenary: There is no limit to the number of member a coparcenary may have . there can be a big coparenary consist of the father , his sons , grandsons and great grandsons . There can be a coparcenary within a coparcenary comprising sons and their descendants also.

Coparcenary property: Property inherited by a Hindu male from his male ancestor i.e. his father, father's father, and father's father's father is called coparcenary property. In this property the sons acquire a right by birth. Coparcenary property can be acquired by the following ways;

- Property inherited from paternal ancestor.
- Property inherited from divided father.
- Property acquired by utilising coparcenary property.
- Blended property.

The property is called Daya (heritage). Daya arises out of the relationship with the last owner of the property. Mitakshara school classifies property mainly under two heads:



Unobstructed Heritage (Aprathibandha Daya): 'A' in aprathibandha daya refers to 'minus or without', meaning without restriction on the heritage that comes to a person. All property inherited by a male Hindu from a direct male ancestor , not exceeding three degrees higher to him is called aprathibantha daya The ancestral property of the father is an unobstructed heritage for his putras (three lineal male descendants).Unostructed heritage devolves by survivourship.

Obstructed Heritage (Saprathibandha Daya): 'Sa' means 'with' and prathibandha refers to an obstruction. All other relatives other than the putras only have an obstructed heritage in the ancestral property in the presence of the putras. In the self acquired property of the father, the putras have only an obstructed heritage and it devolves by inheritance.

Difference between Mitakshara and Dayabhaga with regard to daya: According to mitakshara school of thought, in the daya the putras acquire a right by birth and their shares fluctuate with birth and death in the family, and there can be partition during the lifetime of the father.

According to dayabhaga school, the putras have right only after the death of the father. There can be no partition during the life time of the owner and the shares of the coparceners was definite.

Gains or learning : Any property or income acquired with the aid of joint family funds would in itself become joint family property. But if it is applied without any exceptions it can lead to strange consequences. The children in a joint family may receive education out of the joint family funds. On the question whether the gains of learning should be separate property of the acquirer or coparcenary property ,prior to 1930 there was a distinction between primary education and special learning. After the passing of The Hindu Gains of Learning Act 1930 (Jayakar Act). This Act was the outcome of the decision in Gokul Chand 's case. This Act gains of learning are self acquired property, whether the education imparted was ordinary or special education. Gains of learning are thus always self acquired property as the result of the Act.

Rights of coparceners:

1. Right by birth in the property.
2. Right to common ownership and enjoyment.
3. Right of survivorship.
4. Right to challenge alienation.
5. Right to make acquisitions
6. Right to partition.
7. Right to accounts.
8. Right to renounce his interest.

1. **Right by birth in the family:** The moment a coparcener is born he acquires an interest in the coparcenary property which is equal to the interest of the father. For a coparcener who is introduced into the family by a valid adoption, from the date of adoption he is deemed to be born in the adoptive family and acquires an interest in the coparcenary from that date.

2. **Right to common ownership and enjoyment:** The coparceners together posses the title to the coparcenary property,. The ownership of the coparcenary property vests with the members .All coparceners together have a joint title or ownership of this property. Common or joint ownership signifies joint liabilities to pay off debts of the family.

3. **Right of survivorship:** When a coparcener dies as a member of an undivided coparcenary , his interest in the property is immediately taken by the surviving coparceners and he leaves nothing behind that can be called his own share in the joint property. This is the right of the surviving coparceners to enlarge their shares in the property is due to the application of the doctrine of survivorship. The right of survivorship is one of the basic right of a coparcener.

4. **Right to challenge alienation:** The power of alienation of the joint family property is with the karta. When karta makes alienation for unauthorised purposes, the coparcener have the following remedies;

   a. Where the karta is contemplating alienation, he can ask for partition and separate from the family. Ones he separates karta cannot sell his share;

   b. Where alienation or the property is already affected, it can be challenged by the coparceners as invalid and not binding on them .

5. **Right to make acquisitions:** A coparcener can hold an interest in the coparcenary property and posses separate property of his own at the same time. He has full power of disposal over his separate properties . NO coparcener can claim a right of survivorship in it and on the death of the owner, this property will pass to heirs under the relevant laws of inheritance or testamentary succession if leaves behind a valid will.

6. **Right to partition:** A coparcener is competent to demand partition. He can do so by manifesting an unequivocal intention to separate himself from the joint family and communicate it to other coparceners. No coparcener including even the karta can refuse the demand of partition by a coparcener. Minority is no bar for seeking partition , but the minor cannot seek partition directly. HE can institute a suit for partition through a next friend in a court of law.

7. **Right to accounts:** The karta has the authority to manage the joint family affairs and he is not liable to accountable to the other members except in the following situations;

   a) He is conducting family business and the nature of the business is such as necessitates maintenance of proper accounting;

   b) There are charges of fraud or misappropriation of income;

   c) When the coparcener asks for partition.

8. **Right to renounce his interest:** A coparcener is empowered to renounce his undivided share in the joint family property, in favour of all the remaining coparceners. Two things are important here. Firstly renunciation should be of the entire undivided interest of the coparcener. Secondly, such renunciation must be favour of all the remaining coparceners. The coparcrner who renounces his interest is now not entitled to get a share in the property when partition takes place .

Difference between joint family and coparcenary:

A joint family is a bigger institution and includes a coparcenary within it. There can be a joint family without a coparcenary. But the reverse is not possible. Both male and female can be members of the joint family but in a coparcenary only male can become a member. Joint family need not have property, but coparcenary is understood as a right over property. In the joint family, there is no limitation with regards to generation. But coparcenary is limited only to four generations. Every joint family is not a coparcenary but every coparcenary is a joint family.

Changes made by legislation to the joint family and coparcenary system:

The first change was brought about by the Woman's Right to Property Act 1937 which posted survivorship after the death of the coparcener's widow. Sec. 3 of the Act provided that when a Hindu dies having an interest in a Hindu joint family property, his widow or in case more than one widows shall have in the property the same interest as he himself had. The interest which she takes is only a limited interest known as women's estate.

The second change was made by Hindu Succession Act, section 30 which permits a coparcener to dispose of by will his undivided interest in the coparcenary property , in such case the rule of survivorship does not operate. Further under section 6 the act, even in the absence of a will, if the coparcener dies leaving a class I female heir, then a notional partition will take place with regard to his undivided interest and this share is to be given to his class I heir and not according to survivorship rule.

The third change was made by The Hindu Succession (Ammendment) Act 2005 section 6(1), which included female as coparcener and they have the same rights and liabilities as that of the son and under sec.30 women are given power to testamentary disposition of their interest in such property.

PARTITION:

To bring the joint status of the family to an end by division is called partition (vibhaga).It refers to both property and status. In Hindu law it generally means a division or splitting up of joint Hindu family into smaller or separate units with the conferment of separate status on the divided coparcener. For example, a Hindu family comprises of the father F, his wife W, a son S, son's wife SW and a daughter S as illustrated in the figure below

This joint family has two coparceners, father and son, so a partition is possible, and when it is effected , this family will break and give way to two families, the first comprising the father, his wife and daughter and the second, that of the son and his wife. The undivided status of both the father and the son comes to an end.

The subject matter : The subject matter of partition is coparcenary property. The separate property of the coparcener cannot be subject to partition as no one except the owner has right over it. No partition is possible unless there at least two coparceners in the joint family. Under mitakshara partition can take place by two means i.e., by severance of status and by metes and bounds. In dayabaga, partition can take place only by metes and bounds.

Person entitled to partition:

a. Coparcener
b. Widow
c. Alienee of the coparcener property.

a. Coparcener : A coparcener by birth has a right in the ancestral property and so entitled to ask for a partition. A coparcener who is a major and of sound mind can at anytime demand a partition. It is one of his inherent rights and does not have to give any reason or justification for seeking partition.

b. Widow: Under The Women's Right to Property Act 1937, when an undivided coparcener having an interest in a mitakshara coparcenary dies leaving his widow, she was entitled to ask for partition and entitled to the share of her husband. However she only took a life interest in the estate which she gets and after her death the estate would devolve upon the next heir of the last full holder.

c. Alienee of the coparcenary property : Where an undivided coparcener alienates his share where he is permitted to do so, the alienee can demand a partition. This partition will not have any adverse effect on the ststus or the rest of the coparceners who would continue to be members of the joint family as before.

Modes of affecting partition: severance of joint family status can be brought about by:

- Unequivocal expression of intention to partition;
- By institution of suits;
- By agreement;
- Conversion;
- Marriage to non Hindu under the Special Marriage Act;
- Automatic severance of status;

1. Conversion
2. Marriage to a non Hindu under The Special Marriage Act
3. Partition by father

Unequivocal expression of intention to partition : When a coparcener expresses his intention to partition it results in partition , and share of each coparcener becomes clear and they hold the property as tenants - in- common and not as joint tenants. Expression of intention should be unequivocal. Expression can be by word or conduct . It is necessary to communicate intention to all coparceners, an un communicated intention does not amount to severance. Once intention to partition is expressed it results in partition , share of each coparcener becomes clear and they hold the property as tenants in common and not as joint tenants.

By Suit : When a coparcener files a suit for partition it amounts to a unequivocal intention to partition. Severance of status relates back to the date of institution of the suit. If a coparcener dies during the pendency of the suit, he dies as a divided member and his legal representatives may continue the suit. In Puttrangamma v. Rangama AIR 1968, karta filed a suit for partition and died on that day itself. The court held that he died as a divided member.

Partition by agreement : If all coparcener decide to destroy their joint family status , it is called partition by agreement .The severance of status takes place from the date of signing of the agreement. The moment there is a bona fide agreement the joint tenancy is converted into tenants- in – common . Minor coparcener should be represented by guardians.

Conversion: A coparcener who renounces his religion and converts from Hinduism, he ceases to be a coparcener and an automatic severance of status takes place, his share is determined and handed over

to him. Prior to the Caste Disability Removal Act 1850 , the converted member forfeited his right in the coparcenary property.

Marriage to a non Hindu under The Special Marriage Act : Under The Special Marriage Act 1954 if a coparcener marries under The Special Marriage Act he was faced with severance from the joint family. This Act was replaced by The Special Marriage act 1976.When a Hindu marries under this Act, and if the spouse is a Hindu, he continues to be a member of the joint family as before. But a marriage to a non Hindu under the Act would operate as an automatic severance of status.

Partition by father: Father under Hindu law has superior powers comparison to other coparceners. He has powers not only to separate himself from the family but also power to separate the sons. He can exercise this right even if the sons dissent. In the absence of the father the grand father has no such right.

Division of property by metes and bounds: It means physical division of property. Before such partition an enquiry into the joint family assets is to be made and an inventory taken with regard to the property.

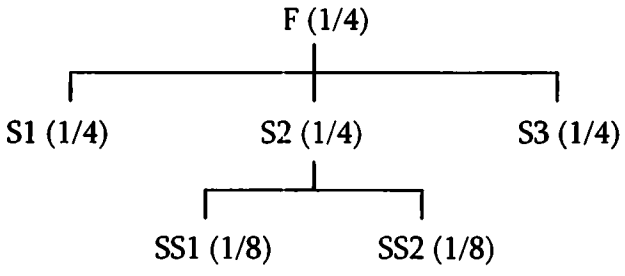
Adjustments or claims before partition: Before the coparceners actually effect a division of the property among themselves, provision should be made for the following;

- For the payment of the debts of the father.
- The maintenance and residence of unmarried daughters, female members, and disqualified coparceners.
- Funeral expenses.
- Marriage expenses of unmarried daughters.

Rules for allotment of shares:

1. Division between father and son- each son takes a share equal as that of the father.
2. Division between brothers- They take equal share.
3. Division among branches- When a coparcenary consist of several branches, the rule is that each branch takes per stripes. The next step will be to effect partition between members of each branch and they take per capita or per head each.

Doctrine of representation: Where a deceased coparcener dies leaving a male issue, he represents his male ancestor in partition and takes his share .For example, as illustrated below were the share of deceased son S2 is taken by his two sons SS1 and SS2 by applying the doctrine of representation.



Reunion: A partition once effected is usually final and binding on the parties. Reunion means to unite again. Reunion under Hindu law is the restoration of the status of coparceners. Two conditions are applicable for reunion, i.e., reunion can take place only between father and son, between brothers and paternal uncle. Only parties to partition can reunite for example , when partition takes place between

father 'F' and his two sons 'A' and 'B', Subsequently a son'C' is born to 'F', reunion can take place only between 'F', 'A' and 'B' and not between 'A', 'B, and 'C'.

Modes of effecting reunion: There must be an intention of the parties to reunite in estate and interest. The Supreme Court in Bhagwan Dayal v.Mst.Reoit Devi, AIR 1962, has pointed that for a reunion there should be an express or implied agreement between the parties to become reunited in estate. The consequence of reunion is that it restores the joint family status. They regain the status of undivided coparceners and are subjected to the incidents of coparcenary. The descendants of the reunited coparceners born after reunion are members of the reunited joint family.

Revocation of partition: Once partition is effected, it cannot be revoked by unilateral withdrawal of interest to separate. It is only possible by a mutual agreement by the members of the family.

Re-opening of partition: a partition once effected is final and binding on the parties and cannot be opened at the will of the parties . Manu says ;

> "Once is the partition of inheritance made.
> Once is a damsel given in marriage and
> Once a man says ' I give '- These are acts of a good man and are done once and are irrevocable".

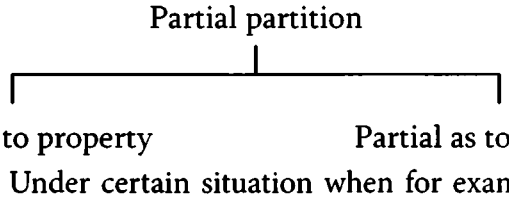
A partition can be re-opened in the following cases;

a. Properties concealed by fraud
b. Lost property

Persons capable of re-opening of partition:

a. Adopted son;
b. Son in the womb at the time of partition ;
c. Son conceived and born after partition;
d. Absent member;
e. Minor coparcener.

Partial partition: While effecting partition ,it is not necessary that the whole of the joint family property should be divided or that all members should separate at the same time and it is permissible in law, to effect a partial partition , both with respect to property and as well as its members.



Partial with respect to property: Under certain situation when for example where the property is under usufructuary mortgage or with a tenant under a perpetual lease. Under such circumstances a complete partition of the entire property is not possible. All coparceners may with consent partition a portion of property, dividing among themselves and at the same time maintaining the joint status with respect to the rest of the property.

Partial with respect to person : When partition is brought about at the instance of only one coparcener, it is he only who separates while the other coparceners may continue with the joint family status. He cannot be a separated member with respect to some of the member' while being joint with others, unless the latter one is from his own branch.

Consequences of partition: Upon partition , a Hindu gets the status of a an individual. The share that he receives is now a fixed and specific share . It his separate property with respect to all those from whom he has separated. On the birth of a male issue he will have a right by birth and a coparcenary again comes into existence.

UNIT-II

INTESTATE SUCCESSION

The Law of Succession is classified into two categories. Intestate Succession and Testamentary. The Law dealing with succession in India is not uniform, depending on multiple factors like religion, domicile, and type of marriage parties have undergone.

Laws relating to Intestate Succession:

The term intestate succession is used to denote the law relating to inheritance. The property of a person on his/her death, in the absence of instruction left by the deceased with respect to its devolution, devolves in accordance with the law of intestate success to which the deceased was subjected to at the time of his/her death. The law relating to intestate succession as applicable to all the Hindus, Christians and Muslims are to be discussed.

HINDU LAW:

Under the Hindu Law, the property that a person may have an interest in, can be categorised into two, separate properties and joint family property. The general scheme of succession is laid down under Hindu Succession Act 1956. The act lays down two separate scheme of succession for male and female intestates.

Basic Features of The Hindu Succession Act 1956:

i. It amends and modifies classical Hindu Law related to joint family and coparcenary.

ii. The provides for a detailed scheme of devolution by intestate succession applicable to Hindus irrespective of the school to which the intestate belonged.

iii. Abolished limited estate for women and replaced it with absolute estate.

iv. Two separate scheme of succession for male and female intestate, In case of female further divergence linked with the source of acquisition of property.

v. The disqualification from inheritance based on physical and mental diseases and conversion were removed.

The subject is discussed under the following heads:

- Succession to Hindu male.
- Succession to Hindu female.
- General principles of succession.
- Disqualification of heirs.
- Changes made by the Act.

Technical terms under the act:

1. Ascendants: ancestors of a person are called his/her 'ascendants'. Father and mother are the immediate ascendants. The father and mother of parents, their parents and so on. Eg. F, FF, FFF, M, MM, MMM, F.M., M.F., M.F.F., etc.

2. Descendants: the offspring of a person. The immediate descendants of a person are his/her sons and daughters. Similarly, their sons, daughters and so on. EgS, SS, SSS; D, DD, DDD; S, SD, SSD, SDS etc.

3. Collaterals: descendants in parallel lines from a common ancestor/ancestors are called the

'collaterals'. Eg Brother, Sister, Paternal Uncle and Aunt, material uncle and aunt and their children.

4. Heir: persons entitled to inherit property of the deceased are called 'heirs'. According to sec.3(f) of the act, "Heir means any person, male or female, who is entitled to succeed to the property of intestate under the act.

5. Agnates: it refers to relationship by male link. When a person traces his relationship with another wholly through males, he or she is called an 'agnate', if she is related to the deceased (propositus) wholly through male links, either by blood or by adoption.According to sec.3(1) (a) of the act, "one person is said to be an 'agnate' of another if the two are related by blood or adoption, wholly through males". Eg Son's son's son; brother's son's son; father's brother's son's son.

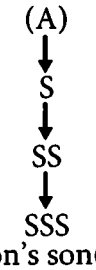
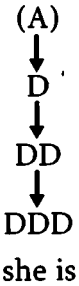


Illustration:- A died leaving behind, his son's son's son(SSS).

In this illustration, SSS is an agnate as he is related through the male links like SS and S.

6. Cognate –It refers to relationship through female link. Tyhe relations in whose chain of relationship to the propositus, there should be at least one female link. E.g. Daughter's son, sister's son, sister's daughter.

Illustration: a died leaving behind, his daughter's daughter's daughter (DDD).



DDD in this illustration is a cognate to A, as she is related to A through female links DD and D.

Full blood or Full blood relations:- When the father and mother of the two (or more) persons are the same , such persons are said to be 'full blood relations'.

According to sec.3(1) (e) (i) of the act, "two persons are said to be related to each other by full blood, when they are descended from a common ancestor by the same wife".

Eg: own or real Brothers, Sisters and Brother and Sister.

Half blood or half blood relations:- When two persons have the same father but different mothers, they are related to each other by half blood or they are called half blood relations.

According to sec. 3(1)(e)(i) of the act "two persons are said to be related to each other by half blood, when they are descended from a common ancestor but by different wives". (same father, but different mothers).

Illustration: A marries B and a son P, and daughter Q are born to him from B. B dies and A marries C and a son R is born o him from C. Later A divorces C and marries D and a son S and a daughter T are

born to him through D. P,Q, R, S, and T are related to other as brothers and sisters by half blood.

In this clause i.e.,. Clause (e) ancestor includes father.

Uterine blood or Uterine blood relationship: children born to the same mother but different fathers are said to be related to each other by uterine blood. According to sec. 3(1) (e) (ii) of the act, "two persons are said to be related to each other by uterine blood, when they are descended from a common ancestress but by different husbands".

In the above clause i.e. Clause(e), ancestress includes 'the mother's.

Illustration: A, (a woman/mother) marries B and a son P and daughter Q are born to her from B. B dies and a marries C and son R is born to her from C. Later , A divorces C and marries D and son S and daughter T are born to her through d. P,Q,R,S and T are related to each other as brothers and sisters by uterine blood.

Legitimate and Illegitimate relationship: a child born to a lawful wedded couple is called 'legitimate child'. The child (boy or girl) is related to his/her parents by legitimate relationship. Where as a child born outside the lawful wedlock is illegitimate and the child is related to his/her parents by illegitimate relationship.

According to sec.3(1) (j) of the act, 'related' means related to legitimate kinship. Provided that illegitimate children shall be deemed to be related to their mother and to one and another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

Reversioner:- In Hindu law, a 'reversioner' is the heir of the last male holder, who will take the property on the death of an intermediate female holder of a limited estate. For instance, A dies and his widow takes limited estate. On the death of the widow, the property goes to the nearest heir of the A and such heir is called he 'reversioner'. With the passing of the Hindu Succession Act, 1956, the limited estate has been abolished and hence, the reversionership has ceased to exist.

1. **Intestate state succession to property of a male:** Sections 8 to 13 deals with Hindu male intestate succession. The heirs of the male Hindu are divided into four categories;
   - Class I heirs
   - Class II heirs
   - Class III heirs(agnates and cognates)

Class I heirs

i. Mother (M);
ii. Widow (W);
iii. Daughter (D);
iv. Daughter of predeceased son (SD);
v. Widow of a predeceased son ((SW);
vi. Daughter of predeceased daughter (DD);
vii. Daughter of a predeceased son of a predeceased son (SSD);
viii. Widow of a predeceased son of a predeceased son (SSW):
ix. Son (S);
x. Son of a predeceased son (SS);
xi. Son of a predeceased son of a predeceased son (SSS0; and

xii. Son of a predeceased daughter (DS);
xiii. Daughter of a predeceased daughter of a predeceased daughter (DDD);
xiv. Son of a predeceased daughter of a predeceased daughter (DDS);
xv. Daughter of a predeceased daughter of a predeceased son (SDD):
xvi. Daughter of a predeceased son of a predeceased daughter (DSD);

Class II heirs

I. Father

II. (1) Son's daughter son
(2) Son's daughter's daughter (now also placed in class-I category)
(3) Brother
(4) Sister

III. (1) Daughter's son's son
(2) Daughter's son's daughter (now also placed in class-I category)
(3) Daughter's daughter's son ((now also placed in class-I category)
(4) Daughter's daughter's daughter ((now also placed in class-I category)

IV. (1) Brother's son
(2) Sister's son
(3) Brother's daughter
(4) Sister's daughter

V. Father's father; father's mother

VI. Father's widow; Brother's widow

VII. Father's brother; Father's sister

VIII. Mother's father; Mother's mother

IX. Mother's brother; Mother's sister.

Class III Heirs

7. Agnates
8. Cognates

The intestate succession as applicable to a Hindu male are laid down in sections 8 to 13 of the act.

General rules of succession in case of a male section 8: The property of a male Hindu dying intestate shall devolve as below.

a. Firstly, upon the heirs specified class I of the schedule.
b. Secondly, if there is no heir of class I, then upon the heirs in class II of the schedule.
c. Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased and lastly, if there are no agnates, then upon the cognates of the deceased.

Order of succession among heirs in the schedule are given in section 9: Those in Class I shall take simultaneously and to the exclusion of all other heirs. Those in the first entry in class II shall be preferred to those in the second entry and those who are in the second entry shall be preferred to those in the third entry and so on in succession.

Rules of distribution of property among class I heir are given in section 10: The property of an intestate shall be divided among the heirs in Class I in accordance to the following rules;

1. The intestate widow shall take one share.
2. The surviving sons and daughters and the mother of the intestate shall take one share.
3. The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.
4. Distribution among the heirs in the branch of the predeceased son shall be so made that his widow and the surviving sons and daughters get equal portion, and the branch of his predeceased sons gets the same portion.. The heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portion.

Rules of distribution of property among class II heir are given in section 11: The property of an intestate shall be divided equally between the heirs specified in any one entry in Class II.

Order of succession among agnates and cognates are given in sections 12 and 13. Rules of preference is laid down here under;

1. Descendants are preferred to all others Among descendants the heir who has fewer degree of descent is preferred .
2. Ascendants are preferred to collaterals. Among ascendants the one with fewer degrees of ascent is preferred.
3. Among collaterals , when the number of degree of ascent is the same, the heirs with a fewer degree of decent is preferred.
4. When these rules do not settle priority, the claimants will take simultaneously.

Doctrine of representation: normally inheritance is taken by the nearest heir. An heir who is remoter in degree is excluded. But some time the remoter heirs are allowed to claim the right of their deceased parent who was of the same degree as the rival claimant. Under The Act of 1956 the principle of representation is stated in Rule 3 and 4 of sec.10. Each son and daughter and each predeceased son and predeceased daughter is taken as a distinct branch, to each of which one share is allotted. The share of the predeceased son or daughter is among his surviving heirs.

General Rules of succession (sections 18 to23) - The general principles of inheritance that are applicable to both male and female intestate are specified in sections 18 to 23 of the Act. These principles gave statutory form to certain well established Hindu norms.

1. Full blood preferred to half blood (sec.18).
2. Mode of succession of two or more heirs (sec.19).
3. Right of child in the womb (sec.20).
4. Presumption in case of simultaneous death (sec.21).
5. Preferential right or right of pre-emption (sec.22).
6. Partition of dwelling house (sec.23)

Intestate succession for the property of a Hindu female:
Section 15 is the first statutory enactment dealing with succession to the property of Hindu female. Earlier her limited estate terminated on her death and there was no question of succession. (This section applies only to the absolute property of a female).

Scheme of succession: The Act proves for three sets of heirs depending upon the source of acquisition of property. Her property is divided into three depending upon the source of acquisition

1. General property
2. Property inherited from parent
3. Property in the form of husband or father in law

General property: Succession to this property is given by section 15(1). The heirs are divided to five categories called entries;

a. Firstly upon sons and daughters (including the children of any pre deceased son or daughter) and husband.
b. Secondly, upon the heirs of the husband.
c. Thirdly upon the mother and father.
d. Fourthly upon the heirs of the father
e. Lastly upon the heirs of the heirs of the mother.

Property inherited from father: succession to this property is governed by section 15 (2). Any property inherited by a female Hindu from her father or mother shall devolve the absence of any son or daughter (including children of a pre deceased son or daughter) not upon the other heirs referred to in section 15(1) in the order specified therein, but upon the heirs of her father. So the property inherited by a female from her parents, the absence of her issues or their children, will revert to her father's heirs.

Property inherited from her husband or father in law section 15(2) (b): in the absence of any son or daughter of the deceased, this property shall not devolve upon the heirs of the husband (Dhanistha Kalita vs Ramakanta Kalita AIR 2003 Gau 92). The object of section 15(2) is to ensure that the property does not lose the real source from when the deceased female had inherited it.

Marumakkathayam law: They are customary laws prevalent in The States of Kerala before 1956. Marumakkathayam system of inheritance means the inheritance by descendants from a common ancestress- a matrilineal system of inheritance. Under this system a female is head of the joint family called Tarward. The senior most male member is known as karnava , and the senior most male member is known as karnavathi. Just like a coparcenary with a coparcenary in a Hindu joint family, there is Tawazhi in the tarwad. Tarward means 'a branch' in the tarward. They were provincial legislations in the former state of Travancore and Cochin with regard to succession, marriage, divorce ets.. and these laws governed the Nairs and Ezhavas.

The Hindu Succession Act 1956 defines marumakkathayam law in section 3(h) and modified this law of succession in certain respects in sections 7, 17 and 30.

Women's Property: Before 1956, the property of a women was divided into two namely;

- Stridhana;
- Women's estate.

Stridhana : The word 'stridhana' literally means 'women's property'. It generally refers to property received by a women before the nuptial , or property obtained by self exertion. Generally the following types of properties come within the preview of stridhana;

1. Gifts and legacies from relatives;
2. Gift and legacies from strangers;
3. Property obtained by self exertion;

4. Property with stridhana;
5. Property acquired by compromise;
6. Property obtained by adverse possession; and
7. Property obtained in lieu of maintenance.

Characteristic feature of stridhana : Stridhana has all the characteristics of absolute ownership and she had full right of alienation and on her death it would devolve on her heirs and not on the heirs of the last male holder of property.

Women's estate: It comprised of property obtained by inheritance and shares obtained on partition. The characteristic feature of women's estate is that she takes it as a limited owner she cannot alienate it (an alienation made by her is voidable at the option of the reversioners) , and on her death it devolves upon on the next heir of the last full owner. Women had power of management over this property.

The Hindu Succession Act under sec 14 has abolished women's estate and has conferred women with absolute ownership over her property. Any property which the Hindu female acquires after coming into force of the act will be her absolute property until given to her with limitation.

Devolution of interest in a Mitakshara coparcenary property : The Hindu succession Act 1956,besides containing rules of succession to the separate property of an intestate, also contain provision for the devolution of coparcenary property by survivorship and testamentary succession

Section 6 of the Act provides for special provision called as notional partition for the devolution of interest in a mitakshara coparcenary. When a male dies leaving an undivided interest in a coparcenary property and left him surviving class 1 female heirs or male relatives claiming through such female heirs his interest in the property shall devolve by testamentary or intestate succession and not by survivorship.

Disqualification under the Hindu succession act: the act provides for three types of disqualification;

1. Remarriage of certain widows (section24)
2. Murderer (section 25)
3. Converts descendants (section 26).

1. **Remarriage of certain widows :** According to section 24,the disqualification is applicable to the following widows :(1) son's widow. (2) grandson's widow. (3) brother's widow. In Kasturi Devi v. Dy. Director of consolidation, AIR1976, the Supreme Court held that the mother of the intestate is not disqualified to inherit on remarriage on the ground that she is related to him by blood and so even if she remarries she does not cease to be his mother.

2. **Murderer :** A person who commits murder of the deceased or the person who abets the murder of the deceased ,or a person who accelerates the commission of murder, is disqualified from inheriting the property. If a person charged with murder is acquitted , the acquittal removes the disqualification. It was so held in Chammanlal v. Mohanlal (AIR1977 Delhi 97).

3. **Conversion :** The Hindu Succession Act 1956, applies only to Hindus .Under ancient Hindu law if a son had converted to another religion, he loses his right to inherit to his father's property. The Caste Disability Removal Act 1850, removed this disability on conversion. It enabled a non Hindu to inherit from a Hindu but it did not extend the protection any further to his descendants. A converts descendants born to him after conversion , if not a Hindu is disqualified from inheriting the property of the intestate.

Dwelling House : Where the inherited property comprised a dewelling house that was in the occupation of the male members of the family of the intestate, special rules where laid provided prior to 2005 for its devolution.

The law prior to passing of The Hindu Succession (Amendment) Act, 2005; sec.23 states that where a dewelling house is wholly occupied by the members of the intestate family, the female heirs shall not have the to ask for partition of the dewelling house until the male heirs choose to divide their respective share therein .The female heirs were entitled to a right of residence therein only if she is unmarried or has been deserted by or separated from her husband or is a widow. This section does not apply in case of testamentary succession where the property goes under awill.

The Hindu Succession (Amendment)Act 2005 has deleted the provision from the act and female heirs have rights equal to male heirs in respect of dewelling house.

Escheatment : According to sec.9 of the act, if there are no heirs i.e. in the absence of class1s to the deceased, the government will take the property. This is known as escheatment.

The Hindu succession (Amendment) Act 2005- primary changes introduced by the act:

- Abolition of doctrine of survivorship.
- Introduction of daughters as coparceners.
- Devolution of coparcenary interest held by a female.
- Abolition of pious obligation of son to pay the debts of the father.
- Abolition of special rules relating to dwelling house.
- Deletion of section 24 relating to widows remarriage.
- Eligibility of female coparceners to make a testamentary disposition.
- Introduction of four new heirs in class I category.

MUSLIM LAW OF INHERITANCE:

The Muslim law of inheritance is based on the rules relating thereto laid in the Koran and the customs and usage prevailing amongst the Arabs. Muslims may be broadly divided into two sects, namely Sunnis and Shias. The Sunnis are further divided to four sub-sect –the Hanafis, the Malkikes, the Shafies and Hanabalies. Majority of the sunnis are Hanafis hence the Sunni law is known as Hanafi law.

The Muslim law of inheritance does not recognise joint family property, the distinction between family property and separate property does not exist. In Mohammedan law , the property of the deceased devolves by succession.

Pre Islamic Rules Of Succession:

1. The nearest male agnate succeeded to the entire estate of the deceased.
2. Females and cognates were excluded.
3. Where the agnates were equally distant to the deceased, they together shared the estate per capita

Improvements Made By Islam:

1. The husband and wife were made heirs.
2. Females and heirs were made competent to inherit.
3. Parents and ascendants were given the right to inherit even when there were male descendants.
4. As a general rule, a female was given one half the share of a male.

General principles of inheritance :

- Property movable and immovable not distinguished.
- No distinction between ancestral and self acquired property.
- No limited interest.
- Birthright not recognised.

Rules of total and partial exclusion: Both sunni and shia law recognises two types of exclusions;

1. Partial or imperfect exclusion ;and
2. Total or perfect exclusion.

1. Partial or imperfect exclusion- it may come in two ways;

a. Exclusion from one share and admission to another. For example daughter in the presence of a son is excluded as a sharer and becomes a residuary.

b. Partial reduction of specific share because of the presence of certain heirs. For example, the share of the wife is either ¼th or 1/8th according to the presence of a child

c. Total or imperfect exclusion- this type of exclusion is based on three principles;

Principle 1- Nearer in degree excludes more remote.(e.g. son exclude son's son; father excludes grand farter).

Principle 11- A person who is related to the deceased through another is excluded by the presence of the later. (e.g. father excludes brother).exception mother does not exclude brother or sister.

Principle 111- Full blood excludes half blood.(e.g. full sister excludes consanguine sister).

Explanation of important terms:

Lineal descendants or ascendants- The person who has descended or ascended in a direct line from another, For example, a man his father , grandfather and so on upwards, are the man's lineal ascendants.

Collaterals- A person having a common ancestor with the deceased , but who is neither an ascendant or descendant of the decease, for example the brother or sister of the deceased.

Paternal and maternal relationships- Claimants related through the father are called paternal relations and claimants related through the mother are called maternal relations.

Agnates- A person whose relationship to the deceased can be traced without the intervention of female link .For example, son's son's, son.

Cognates- A person related to the deceased through one or more female links. For example , daughter's daughter, son.

True Grandfather- The agnatic grandfather between whom and the deceased no female link intervenes.

False grandfather- The grandfather between whom and the deceased one or more female link intervenes.

Consanguine (half) sister and brother- The children of the same father but different mother.

Uterine (half) brother and sister- The of the same mother but different father.

Hanafi Law of Inheritance: The Hannafis (Sunni) did not disturb the pre- Islamic rules , except to the minimum necessaries to accommodate the new heirs. Under Hanafi law the heirs of a deceased Muslim falls under the following heads

1. The sharers;
2. The residuaries;

3. The distant kindred;
4. The state by escheatment.

The course adopted is as follows:

a. First, shares were allotted to the nearest heirs as required by the Koran and were called Sharers.
b. Next, the body of the agnates who were heirs under the pre-Islamic law were maintained and called Residuaries.
c. Finally, all the heirs who were newly introduced (1.e., other female cognates) were relegated to the last and were described as distant kindred.

TABLE OF SHARERS:

(HANAFI LAW)

S.no	Shares	Normal Share Of One	Two Or More Collectively	Condition Under Which The Share is inherited	Share as varied by special circumstances
1	Husband	01-Apr	-	When there is child or child of son h.l.s.	1/2 when there is no child or child of son h./.s.
2	Widow	01-Aug	01-Aug	When there is child or child of son h.l.s.	1/4 when there is no child or child of son h./.s.
3	Father	01-Jun	-	When there is child or child of son h.l.s	When there is no child or child of son. Father inherits as residuary
4	Mother	01-Jun	-	a. When there is a child or child son h.l.s. b. When there are brother brother or sister or sisters. c. Brothers or sisters including full brother or sister.	1/3 in other cases a,b,c.
5	True Grandfather	01-Jun		When there is a child or child of son h./.s, father.	When there is no son and daughter his father, the Grandfather inherits as residuary.
6	True Grandmother	01-Jun		When no mother.	
7	Daughter	01-Feb	02-Mar	When no son.	When son, she becomes a residuary.

8	Son's daughter	1/2	02-Mar	When no son, daughter son's son.	Only one daughter, son's daughter will take 1/6
9	Uterine brother	01-Jun	01-Mar	When no child, child of a son, father or true grandfather.	
10	Uterine sister	01-Jun	01-Mar	When no child, child of a son, father or true grand father.	
11	Full sister	01-Feb	02-Mar	When no child, child of a son, father or true grandfather.	With full brother she becomes residuary.
12	Consanguine sister	01-Feb	02-Mar	When no child, child of a son, father or true grandfather, full brother full sister.	But if there is only one sister, consanguine sister will take will take as (residuary) 1/6.

h.l.s – how low so ever
h.h.s- how high so ever.

2. **Residuaries:** The term 'residue' means ' the remainder or the remaining after taking away a part of it'. Residuaries are those relations of the deceased who share the residue from the estate if the deceased after allotting specific share to the sharers. If there are no sharers, the whole property is distributed among the residuaries. The residuaries may be classified as follows:

   a) Descendants
      Eg:- son, son's son h.l.s

   b) Ascendants
      Eg:- Father, true grandfather

   c) Collaterals or descendant of the father
      Eg:- Full brother ,full sister, full brother's son.

3. **Distant kindred:-** The following are the list of distant kindred , which are grouped into four classes:

   I. Descendant of the deceased.-
      1. Daughter's children and their descendants.
      2. Children of son's daughter h.l.s. and their descendants.

   II. Ascendants of the deceased.-
      1. False grandfather h.h.s.
      2. False grandmother h.h.s

   III. Descendants of parents.-
      1. Full brothers daughter and their descendants.
      2. Consanquine brother's daughters and their descendant.
      3. Uterine brother's children and their descendants.
      4. Daughters of full brother's sons h.l.s. and their descendants etc.

IV. Descendants of immediate grandparents(true or false).-

1. Full paternal uncles daughter and their descendants.
2. Consanquine paternal uncles daughters and their descendants .
3. Uterine paternal uncle and their children and their descendants etc.

The Doctrine of Aul (increase): In the Muslim law of inheritance which allots a number or fractional parts of unity to heirs , it may happen that the fractions when added together may sometimes be (i) equal to unity, (ii)more than unity, or (iii)less than unity. When the sum of fraction is equal to unity there is no problem . But if it is more or less than unity, the shares of the respective heirs are reduced or increased respectively. The shares of the sharersare to be adjusted against the denominator by increasing the denominator , this known as Doctrine of Aul .

The increase or aul is effected in the following manner:
If the total of fractional share allotted to sharers exceeds unity, the share of each sharer is proportionately diminished by 'reducing the fractional share to a common denominator; and increasing the denominator as to make it equal to the sum of the denominators".

Doctrine of Radd or return : If the sum total of fraction allotted to shares is less than unity i.e. property is left back after satisfying the claims of the sharers and there is no residuary to take the residue ,the residue reverts back to the sharers in proportion of their share. Such return is called 'Radd' or the doctrine of Radd. Under the doctrine of Radd, the share of the sharers are to be increased proportionately, for this purpose, the denominators of the respective shares of the shares are to be reduced to equalise the total denominator with the total numerator.

Illustration:- P dies leaving behind his mother and daughter. According to the Quranic tables mother gets 1/6 and daughter gets ½. The total comes to 1/6+1/2= 1+3/6=4/6. In this illustration , numerator 4 indicates the unit of the property to be distributed, while the denominator ,6 indicates the unit of property available. To equalise this as 4/4, applying the doctrine of Radd the shares of the mother and daughter are to be adjusted by increasing their share proportionately by increasing the respective denominators. The shares of the mother and daughter are 1/6 and ½ respectively. To make the denominator common, the shares are converted into 1/6 and 3/6 . The total is 1/6 +3/6 =4/6. Now the numerator is 4 and denominator is 6. In order to equalise the denominator, they are reduced by 2 i.e. 1/6 is converted to ¼ and 3/6 is converted to ¾ so as to arrive at 4/4 (1/4+3/4=4/4). Thus by applying the doctrine property can be readjusted among sharers when there are no residuaries. The exception to it is that in the presence of any heir , neither the wife or the husband is entitled to any return.

Shia Law Of Inheritance: The Shias changed the pre-Islamic law by altogether abolishing the difference between the agnates and cognates as also males and females. The Shia system (unlike the Hanafi) shuffled all the heirs, cognates and agnates. According to Sunni, the daughter's son (being cognate) was relegated to the last class of heirs distant kindred , the daughter's son's were entitled to a much higher position.

According to Shia law, there is only two groups of heirs.

1. By marriage (husband and wife).
2. Heirs by consanquinity (blood relations) –are subdivided as follows
   a) (1) Parents
      (2) Children and other lineal descendants
   b) (1) Grand parents
      (2) Brother sister and their descendants

c) (1) Paternal uncle and aunts of the deceased and of his parent and grandparents and their descendants.

(2) Maternal uncles and aunts of the deceased and of his parents and g grand parents and their descendants.

The heirs in the earlier group exclude the heirs in the later group.

Sharers and Residuaries in shia law- Shias divide heirs into two classes, namely sharers and resudiaries .The division of heirs into the above two classes is for the purpose of determining the share of individual heirs. There are nine shares who take specific shares as shown in the table below. The descendants of sharers are also sharers. Those heirs who are not included in the class of sharers are all residuaries. The descendants of the residuaries are also residuaries.

TABLE OF SHARERS (SHIA LAW)

Sharers	Normal share		Conditions under which the share is inherited	Share as varied by special circumstances
	Of one	two or more		
Husband	1/4		When there is a lineal descendant	½ when there is no such descendant
Wife	1/8	1/8	When there is a lineal descendant	¼ when no such descendant.
Father	1/6		When there is a lineal descendant	(If there be no lineal descendant the father inherits as residuary)
Mother	1/6		a. When there is a lineal descendant or b. When there are two or more full consanguine brothers or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
Daughter	1/2	2/3	When no son	(with son she takes as residuary)
Uterine brother or sister.	1/6	1/3	When no parent or lineal descendant	
Full sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father	The full sister takes as a residuary with the full brother and also with the father's father
Consanguine sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or sister, or consanguine brother or father's father.	(the consanguine sister takes as a residuary with the consanguine brother and alo with the father's father.

Principle of distribution of property:

i. If the deceased leaves only one heir, the whole property goes to him
ii. If the deceased leaves more than one heir, the first step is to assign shares to the heirs belonging sharer class.

Pre-Emption: (Shufaa) (sec 4 of Partition Act)

It is the right which the owner of an immoveable property possess to acquire by purchase another immovable property, which has been sold to another. It is a right which the owner of certain property possess, for the quiet enjoyment of that immovable property, to obtain certain other immovable property not his own. There are three requisites.

1. The pre-emptor must be owner of immovable property.
2. There must be a sale of immovable property not his own.
3. Pre-emptor stands in certain relationship to the vendor.

Persons entitled to claim pre-emption:

- A co-sharer in the property (Shafi-i-Shareek)
- A participator in immunities and appendages (Shafi-i-khalit)
- Owner of adjoining immovable property(Shafi-i-jar)

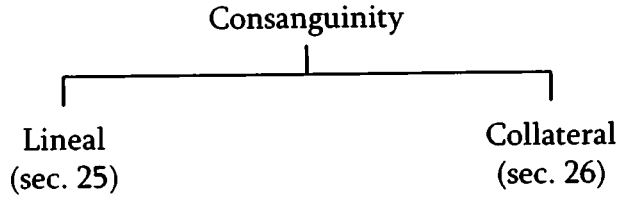
Loss of right of pre-emption:

- Omission to claim or waiver
- Death of the pre-emptor before enforcement
- Forfeiture of right.

CHRISTIAN LAW OF INHEREITANCE

The Indian succession Act in part 1V and V contains provisions applicable to a Christian dying intestate. Succession is based on consanguinity.

Kindred or Consanguinity (sec 24): It is the connection or relationship of a person descended from the same stock or common stock. The relationship contemplated should flow from a valid wedlock.



Lineal consanguinity:

1. Lineal consanguinity is that relationship which subsists between two persons, one often whom is descendant in a direct line from the other, as between a man and his father, grandfather and great grandfather, and so upward in the direct ascending line, or between a man and his son, grandson and great grandson, and so downward in the direct descending line.
2. Every generation constitute a degree, either ascending or descending.
3. A person's father is related to him in the first degree and so his son; his great grandfather and grandson in the second degree; his great grandfather and great grandson in the third degree and so on.

Collateral consanguinity: Is that relationship which subsists between two person, who are descended from a common stock or ancestor, but neither of them whom is descendant in a direct line from the other.

In case of collateral consanguinity, the rule is to count upwards from the deceased person deceased to the common and the downwards to the collateral relative- reckoning a degree for each person both ascending and descending.

Devolution of the property of an intestate (sec.32): The property of an intestate devolves upon the wife or husband or upon those who are kindred to the deceased in the order contained in chapter 11 to part V.

Succession to male intestate (sec.33): when the intestate has died;

(a) Leaving a widow and lineal descendants, then one third of the property shall belong to the widow and the remaining two third shall go to the lineal descendants.

(b) If he has left no lineal descendants, but has left widow and kindred to him, then one half shall devolve to his widow and the other half shall go to the kindred.

(c) If he has left none who are kindred to him ,the whole of the property shall belong to the widow.

Succession to a female intestate (sec 35): A husband surviving the wife has the same right in respect of her property as the widow has in respect of her husband's property if he dies intestate.

a) If she dies leaving lineal descendants ,then the husband gets one third and the remaining two third goes to the lineal descendants.

b) If no lineal descendants but only kindred, the husband gets one half and the remaining half will go to the kindred.

c) If no kindred, the husband takes the entire property.

The rules of distribution where there are lineal descendants are given in sections 36 to 40.

The rules of distribution where there are no lineal descendants are given in sections 41 to 48.

Distribution of property when there are lineal descendant :

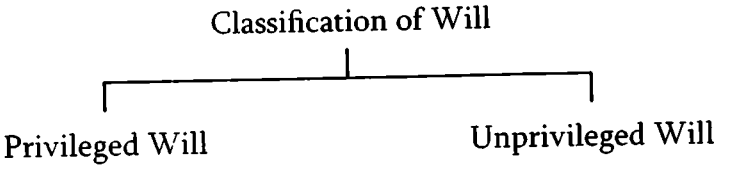
1. To deduct first the share of the spouse.
2. If there are lineal descendants to distribute the residue among them (whole property if there is no spouse).
3. Where the intestate has left child or children only and no more remote heirs the property shall belong to the surviving child or if more than one child then to all the children equally.
4. Where the intestate has left no child but only grandchild or grand children, the property shall belong to the grandchild or if more than one grandchild, it shall equally be divided among all the surviving grandchildren.
5. Where intestate leaves lineal descendants of different degree of kindred to him, then they take equally per-stripes , i.e. children and grand children and great-grandchildren equally take between them their deceased parents share.

UNIT-III
TESTEMENTARY SUCCESSION

Testamentary succession:

The general law of the land for regulating testamentary succession to the separate property of an Indian is the Indian Succession Act 1925. Muslims are governed by the Quranic law. The procedural rules of Indian Succession Act with some reservations also apply to Indian Muslims.

A will is a legal declaration of the testator with respect to his property which he desires to take effect after his death. It is a devise with the help of which an owner of property make a disposition that is to take effect after his death. Under the act a person has power to make a will or a testament of the totality of his separate property. A copacener can bequeath his undivided share in the coparcenary property under The Hindu Succession Act(sec.30).



Privileged will (sec. 66):

Any solider , airman or mariner being employed in an expedition or engaged in actual warfare, if he has completed the age of eighteen years can dispose of his property by a will in the manner provided in sec.66.Such wills are called privileged will.

It may be made orally by declaring the testamentary intention before two witnesses. If it is in the handwriting of the testator, it need not be signed or attested. Even verbal instructions, if given in the presence of two witness is deemed to constitute a will. Even if it is not written and signed but written by his instruction and recognised by him as his will then it is deemed to be a valid will. Instructions in writing of the testator for preparing the will can also constitute a valid will. A will made by word of mouth shall be null at the expiry of one month after the testator, being still alive and he is ceased to be entitled to make a privileged will.

Revocation or will (sec 70): A will by its very nature is revocable. A testatoris not bound by the testamentary disposition that he makes and he can always cancel or chance it. Under the Act a will can be revoked in the following cases:

- Subsequent will.
- Written declaration of intention to revoke.
- Destruction of will.

Lapse of legacy (sec105): When a bequest fails to take affect for some reason in favour of the legatee for whom it was intended it is called lapse of legacy. The legatee has to survive the testator, if he does not the legacy lapses and forms a part of the residue of the testator's property.

Ademption of legacy (sec152): Ademption may be defined as the failure of a specific bequest through its subject matter not being in existence at the testator's death. If anything which has been specifically bequeathed does belong to the testator or has been converted into another property of a different kind, the legacy is said to have adeemed .

Different kinds of legacies:

- Specific legacy(sec. 142)
- Demonstrative legacy(sec.150)
- General legacy(sec.171)

Specific legacy- When the testator bequeaths to any person a specified part of his property , which is distinguished from all other part of his property, the legacy is said to be specific. It must be identifiable by special description and separated in favour of a particular legatee. A bequeath to a legatee a bungalow out of the testators asset is a specific legacy.

Demonstrative legacy- Where the legacy is directed to be paid out of specified property, the legacy is said to be demonstrative. It is not liable to ademption, and it becomes payable from the general assets of the testator.If a specifis sum is directed to be paid out of the income from specified property , the legacy is demonstrative.

General legacy-May or may not be a part of the testators property. If there is a bequest of something in general term the executors must purchase for the legatee what may reasonably answer the description. I t is liable to be abated but not adeemed. If the bequest be in general terms, e.g., "of a horse" and if no horse be found in the testator's possession at the time of his death, the executor is bound, provided the state of asset will allow him ,to procure a horse for the legatee.

Abatement of Legacy: Abatement means rateable or proportional . Generally legacies are payable after satisfying the debts and necessary expenses. If after payment of debts the assets are not sufficient to pay all legacies the proportional reduction of the legacy is done.

Executor and Administrator:

Executor - Is a person to whom the execution of the last will of a person deceased is by the testator appointed(sec2(c)). He derives his authority from the will. A will must contain expressly or by implication the name of the executor otherwise, no probate can be granted.

Administrator- Is a person appointed by a competent court to administer the estate of the deceased when there is no executor(sec2(a)). He derives his title from the letters of administration. Letters of administration are granted by a court having probate jurisdiction. It shows that the authority incident to the office and the duty of an administer has been devolved upon the person therein named.

Duties of executor or administrator are set forth in sections 305 to 331. They fall under the following heads-

- Duties to the court.
- Preferential payments.
- Duties to the creditors
- Duties to legatees.

Succession certificate: Chapter X containing sections 370 to390 of The Indian Succession Act, 1925 contains provisions dealing with succession certificate.A succession certificate is granted by the court with respect to any debts or security to which a person has become entitled to as the result of succession to another .It is intended to facilitate the collection of debts on succession. The debtor of the deceased creditor can making payments to the holder of the succession certificate . The debtor is protected even against misrepresentation by the holder of the certificate. Succession certificate can be granted in the following cases:

- When a grant of probate or letters of Administration is not compulsory under sec. 212 or sec. 213.
- When the deceased is an Indian Christian (sec. 370 proviso.)
- When the deceased is a Mohammedan.
- When the deceased is a Hindu and has left a will and probate, such a will is not compulsory under sec. 57.
- In the case of joint family property, which passes by survivorship under Hindu law.

Contents of the succession certificate- Succession certificate contains the following particulars:

(a) Debts and Securities as specified by the court of competent jurisdiction.

(b) Persons to whom the certificate is granted to.

(c) The powers empowered, namely to receive interest and dividends or to transfer the securities or any of them.

Codicil: This word is derived from the roman word 'codillcillus' meaning an informal will. An instrument made in relation to a will and explaining adding or altering to its disposition, and shall be deemed to be a part of the will (sec 2 (b)).A codicil cannot be oral and must be an instrument. The purpose of the codicil is to make slight changes in the will which has already been executed.

Probate: It is a copy of the will certified under the seal of the court with the grant of administration to the estate of the deceased person (sec2 (f)).Though the executor derives his title from the will and not the probate , still the probate is the only proper evidence of the executors appointment. Probate of will when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor. Sections 217 to 236 of The Indian Succession Act, 1925 deals with probate and letters of administration. Letters of administration are granted by the court having probate jurisdiction to show that the authority incident to the office and duty of an administrator has been devolved upon the person therein named. A probate is only conclusive as to the appointment of executor and the valid execution of the will. It does not decide any question of title. A grant of probate does no more than establish the factum of will and the legal character of the executor.

Domicile: The word 'Domcile' is not defined in the act. Chatty. J defines domicile as "That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefore".

Sec 5-(2):- succession to the immovable of a deceased is regulated by the law of the country in which the person had his domicile at the time of his death. Succession to the immovable property in India shall be regulated by the law of India – i.e., les loci rei sitate by the law of the land and not by domicile of owner. If a person dies leaving a will, the validity of the will is determined by les loci.

Eg: "A" having his domicile in India dies in France, leaving moveable property in France England and both moveable and immovable in India.

Ans: succession to the whole is regulated by Law of India.

Classification of domicile:

1. By birth- domicile of origin.
2. By choice.
3. By operation of law.

Domicile of origin:
Domicile of origin (sec.7) of person of legitimate birth is the country in which at the time of his birth, his father was domiciled, if he is posthumous child , then the country in which his father was domiciled at the time of his father's death.

Domicile of origin of illegitimate child (sec.8) is the country in which at the time of his birth, his mother was domiciled.

Domicile of choice:

Acquisition of new Domicile (sec.10) :

A man acquires a new domicile by taking up his fixed habitations in a country which is not that of his domicile of origin. The presumption of law is always against the change of domicile. A domicile by choice is obtained by a combination of fact and intention. In the absence of intention the length of the residence is very strong ground for inferring an intention to make a residence a fixed habitation. No new domicile is obtained without a clear intention of abandoning the old domicile

By operation of law:

Minor's Domicile (sec.14) - Follows that of the parent from whom he has derived his domicile of origin.

Exception- the domicile of a minor does not change with that of his parent under the following situations;

- If the minor is married.
- Holds any office in the service of the government.
- Set up distinct business with parents consent.

Domicile Obtained By A Women On Marriage(sec.15) -

By marriage , a women acquires the domicile of her husband, if she had not the same domicile before.

Wife's domicile during marriage (sec.16) - follows the domicile of her husband, except if they are separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.

Doctrine of Cy pres : the expression cy pres literally maens " as early as possible" . The doctrine vof cy pres is applicable when a bequest is made upon a condition precedent. When the testator has expressed a general intention and also a particular way in which he wishes it to be carried out, buy if the intention cannot be carried out in that particular way then the court will direct the intention to be carried out , as nearly as possible in the way desired. Eg:- where a bequest is given to 'A' on the condition that he should marry with the consent of X Y and Z. X died later. If A marries with the consent of Y and Z, then the condition is said to have been substantially complied with.

Wasiyat:

The word 'Wasiyat' (will) means, a moral declaration in compliance with moral duty of ever Mussallman to make arrangement for the distribution of his property. A pre- Islamic Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts inter vivos, and there was nothing to prevent him from giving away his entire property to some stranger leaving his own heirs. It was after the advent of Islam that Quran laid down specific rules for the distribution of inheritance .Islam placed a restriction on the testators power, so that he was not allowed to bequeath more than one third of his estate. The will of a Muslim is governed in India subject to the provision of the Indian Succession Act 1925and by the Mohammedan Law (Tyabjii).

Form of will: It may be made orally or in writing, convenience however demands that it should be in writing. The intention of the testator should be clearly expressed.

Who can make a will: A Muslim who is of sound mind and a major can make a will. A purdahnasheen lady is also competent to make a will. A will made by a person after he had taken poison, or done any act towards commission of suicide is not valid. The Shia law however says that if the person made the will and then committed suicide, the bequest would be valid. A person condemned to death may also make a will.

Subject of a will: The corpus of a property should be in existence at the time of the testator's death and could be non-existent at the time of making the will. The usufruct of a property can be bequest.

For whom a will can be made: Any person capable of holding property; whether male or female, Muslim or non-Muslim may validly avail the benefit of a bequest. Unborn persons cannot be a legatee under a will, however if the legatee is in the womb and birth takes place within six months from the date of the will, he can be a lawful legatee. Heirs cannot be legatees, unless other heirs give their consent to it.

Testamentary limitations: There are two limitations on a Muslim's power to bequeath;

(1) He cannot bequeath to his heirs (Without the consent of other heirs) and

(2) He cannot bequeath more than one third of his estate.

In Sayeeda Shakur vs Sajid Phani (2006)4 CLT192 The Bombay High Court held that a Muslim married under The Special Marriage Act, was entitled to bequeath his entire property and the provisions of the Indian Succession would apply to him.

Reasons for limitation on the testamentary powers: It is the policy of the Mohammadan law to prevent a testator from interfering by will with the course of devolution of property among his heirs according to law. The object also includes the concern to see that no heir is left destitute. This has been repeatedly confirmed by judicial verdicts in Asma Beevi v. M. Ameer Ali. (2008) 6 MLJ 92, where it was held that a Mohammedan cannot by will dispose of more than 1/3 of his estate after payment of funeral expenses and debt, unless consent is obtained from legal heirs, after the death of the testator. This consent of the legal heirs need not be expressed and it may be signified by conduct showing unequivocal intention. In Sayeeda Shakur vs Sajid Phani(2006)4 CLT192 the Bombay High Court held that a Muslim married under The Special Marriage Act, was entitled to bequeath his entire property and the provisions of the Indian Succession would apply.

UNIT-IV
GIFT UNDER ISLAMIC LAW

Gift under Muslim Law is called Hiba. It is a transfer of property, made immediately by one person called the donor the other person called as the donee and accepted by or as behalf of the latter and followed by delivery of possession. Thus, whereas Muslim law allows testamentary disposition in the limit of one-third, a gift inter-vivos (from one living person to another living person) may be made without any restriction. Muslim Law allows a man to give away the whole of his property during his life time.

Essentials of Hiba:

1. Declaration by donor.
2. Acceptance , expressed or implied by or on behalf of the done.
3. Delivery of possession of the subject matter of gift by donor to done.

Exception to delivery of possession: there are certain cases in which delivery of possession is not necessary.

1. When the donor and done reside under the same house.
2. When the donor and done are husband and wife.
3. Gift to minor by father, mother or guardian.
4. Gift to done in possession (e.g. bailee).

Who can make a gift (donor): Every Muslim male or female who is a major and sane may make a gift provided he or she is subject to any force or fraud. An insolvent may also make hiba with bonafide intention or else it would be revocable at the option of the creditors. Thus rushd (sanity), bulugh (majority) maliki (ownersly) and no undue influence are the ingredients of capacity to make hiba.

In whose favour (donee): Hiba can be made in favour of any living person capable of holding property, thus a gift to an unborn person is invalid. A gift to a child in the womb may be made provided the child is born within 6 months from the date of the gift. Gifts may be validly made to any juristic person and to non Muslims.

Subject matter of Hiba: All forms of property over which control may be exercised are proper subjects of gift. This includes moveable, immovable, corporeal and incorporeal. The subject matter of Hiba must be in existence on the date of making the gift or else void. A gift may be validly made of an undivided share (mushaa) in a property which is incapable of being divided. A gift of mushaa capable of division irregular but not void. Subsequent divisions and delivery of possession renders the gift valid.

Revocation of gift: According to Muslim law all voluntary transaction are revocable, hence a gift may also be revoked. There is, however a difference between complete and incomplete gifts i.e., after or before the delivery of possession.

1. Before delivery: A gift may be revoked any time by the donor before delivery of possession, the reason is that a gift is no gift before delivery of possession as stated in Bibi Riajan Khatoon vs Sadrul A lam AIR 1996 Patna 156.
2. After delivery: Revocation is only possible by the intervention of court of law or by consent of the done. The following gift cannot be revoked even with the consent of the done.
    a. Where it is made by husband to his wife or vice versa.
    b. Where the donor and done are related to one another within the prohibited degrees by consanguinity.

c. When the donor or done dies.

d. Where the thing given is destroyed or lost.

e. Where the motive of the gift is religious or spiritual.

Gift involving return (ewaz) = Hiba-bil-ewaz:- After the gift has been made, the done may offer to make a reciprocal, then it is called iwaz. If this return gift is accepted, then it is called Hiba-bil-ewaz. Payment of consideration is important. Hiba-bil-iwaz has all the elements of sale and therefore the basic formalities for affecting a sale under the transfer of property act, are applicable here.

Illustration:

(a) X makes a gift to Y of a horse. Y in then makes a gift of a camel to X and states that the gift of the camel is a return for the primary gift of the horse, X accepts it. Here , the gift of the camel is the return or ewaz for the primary gift of the horse, and it is a Hiba- bil- iwaz.

(b) X makes a gift to his cousin Y, saying , " it is in consideration of your being my cousin". It is not Hiba - bil – iwaz.

The courts in India have held that a transaction of this character is nothing but a sale, therefore where property is immovable and worth rupees 100 and above, it must effected by a registered instrument

Sadaqah: these are gifts with religious motive. Sadaqah is irrevocable. It can be made to two or more person with the incidence of joint tenancy, provided they are poor.

Ariyat: It is a gift of the right to enjoy the usufruct in a specific property specific property and for a specific time and is revocable at the pleasure of the donor.

Hiba-ba-shart-ul-ewaz: When a gift is made with stipulation (shart) for return (ewaz) it is called Hiba-ba-shart-ul-ewaz. The distinction between hiba-bit-ewaz and hiba-ba-shart-ul-ewaz are that in the former, the intention to make an ewaz is an after thought. While in the latter, the two go hand in hand i.e., the return is contemplated by both parties. The return gift must be made with all the formalities necessary for Hiba, i.e., offer acceptance and delivery of possession.

Marz-ul-maut: A gift made in death-illness and it takes effect as a will. 'marz means illness and 'maut' means death. Thus Marz-ul-maut means illness that result in death. A gift made during marz- ul maut is subject to all the conditions and formalities prescribed under Muslim law for gift inter vivos. This gift is treated as a combination of gift as well as a will (Wasiyat). All three ingredients of the gift must be complied. In addition to it, as it also treated as a will, it cannot be made of more than one-third of the total property of the donor, unless heirs consent. When the donor recovers from illness, the gift would become an ordinary gift. So testamentary restriction would not apply.

Essential conditions of Marz-ul-maut- The first condition is that the person must suffering from illness; second , that there must be an apprehension of death in the mind of the patient; and third, that he actually dies.

Gift and Will Compared

	Gift	Will
1.	Existence of property must; at the time of gift the testator.	Not essential at the time of making the will, but must at the time of death of
2.	Transfer of possession of property must, at the time of gift	Not done; property devolves on the legatee after death.
3.	Transfer of property becomes effective instantly	Becomes effective after the testators death.
4.	Doctrine of mushaa applies	No
5.	No limit as to quantum or beneficiary	Two limits__ not more than 1/3rd and not ot heir(subject to the exemption of consent byheirs).
6.	No revocation of a completed gift	May be revoked before death.

Sunni law and Shia law compared

	Sunni	Shia
1.	Suicide—bequest by one who commits the act before suicide before or after making the will is valid (the act means.. e.g. taking poison).	Bequest is valid only if the act for committing suicide was done after making the will. not if the act was done first and then the will made.
2.	Child in the womb__ bequest for unborn person valid if the child is born within 6 months of making of the will.	Valid if the child is born within 10 months of making of the will.
3.	Consent of heirs	Consent of heirs
a.	For bequest in favour of stranger up to 1/3rd property—not required.	same
b.	For bequest in favour of heir (even 1/3rd) consent of other heirs necessary	For bequest in favour of heir (1/3rd) consent. Not necessary. For more than (1/3rd) necessary.
4.	Consent of the legatee presumed if he dies before consenting.	No presumption; but the consent of his heirs must be obtained.
5.	Time of consent—after death the testator. Consent before death is not sufficient.	Before or after death, both sufficient.
6.	Bequest for one who has caused the death of the testator is not valid in any case	If the legatee intentionally caused the death of the testator—the bequest is not valid. But if the death was caused unintentionally, it is valid.

7.	Pious bequests-priorities in this order: first---Farz, second Wajibaat, third—nawafil.	Priorities-(i) Farz; (ii) for others-proportionate abatement.
8.	Secular bequests—rule of proportionate abatement.	Rule of proportionate abatement not recognised.
9 .	Lapsing of bequest – the legacy lapses if the legatee predeceases the legator.	No, the legacy devolved on the heirs of the legatee. But if no heirs, it does lapse back to the legator.

UNIT-V

RELIGIOUS ENDOWMENTS AND WAKF

Article 26 of the Constitution gives freedom to every religious denomination to establish and maintain its religious and charitable institutions subject to public order, morality and health. They also allowed the right to administer the properties of these institutions in accordance with law. The state can regulate the administration of trusts and wakf by means of validly enacted laws. Article 26(c) confers on religious denominations a fundamental right to own and acquire property.

HINDU ENDOWNMENTS

From early times, Hindus have been dedicating property for religious and charitable purposes. People having immense wealth donated their property for the welfare of the temples and religion as a gift. This has mainly been under two heads; Istha and Purta. The former indicates the Vedic sacrifices , rituals and gifts associated with such sacrifices. The later etasnds for all other religious and charitable acts and purposes connected with the Vedic sacrifices. The Istha- Purta have been considerd as means for going to heaven. At present such property of the temple are under the control of the Government. They are called as Hindu Endowments.

Essentials of a valid endownment :

- The dedication must be complete.
- The subject matter must be specific.
- The object must be definite.
- The settler must have the capacity to make the endownment.

Math: Math are the place where ascetics are residing. It is a monastic institution presided over by its head., known as Mahant. The ascetics residing in the math have to lead a disciplined life. Ascetics are people who renounced the world. They indulge in the professing of the religion and its principles. The basic principle of math is to encourage and foster spiritual learning and knowledge by maintenance of competent line of teachers who impart religious instruction to the disciples and followers of math and to strengthen the doctrines of the sect or school to which math subscribes.

Classification of Math:- there are three types of math

1. Mourushi math
2. Panchayat math
3. Hakimi math

Mahant: Mahant is a person who is presiding over the math. Mahant acts as a leader of the math and manages the property of math. Mahant remains as a presiding person, even when the temple is attached with math. Without mahant, a math cannot exist .He occupies a fiduciary position, he maintain proper accounts failing which ,he may be removed. He has the power to borrow money for the purpose connected with the Math and bind the endowment property for debts taken for legal necessity. Succession to the office of the Math will be in accordance with the rules or devolution as laid down by the founder of the endowment,

Properties under the math: Even though the mahant is the head of the math, the properties which were acquired by the math and the properties dedicated to it vests in the math. The mahant can only manage the property. The endowed property of a math rests in the math itself as a juristic person and not in the mahant. A math is a juristic person cable of acquiring and holding property.

Management of Math: Unless the founder has directed otherwise, the management of math and it's possession belongs to the mahant with it's properties. The mahant holds properties of math for certain specific purpose or purposes as laid down by the founder or by wage. The mahant should ensure the duties of the math, the performance and festivals of the math. The ceremonies and religious rites and rituals of the math. Management also includes supporting the disciples and other members of the math. The mahant should take care of providing food, stay and like things for the visiting ascetics. All the expenses should be met out from the endowed property only.

WAKF:

Wakf means detention of the property in the ownership of God. The Mussulman Wakf Validating Act 1913 defines wakf in sec 2. Thus wakf means the permanent dedication by a mussulman of any property for any purpose recognised by the Mussulman Law as religious, pious or charitable.The institution of wakf has developed with Islam. There is no wakf or any such parallel institution in Arab before the advent of Islam. Credit must be given to the Muslim jurist for having developed the theory of wakf. The doctrine of wakf which is interwoven with the entire religious life and social economy of Muslims has laid down the foundation of one of the most important institutions of the community. In India alone there are more than one lakh wakfs valued at more than a hundred cores of rupees.

Legal incidents in wakf: there are three legal incidents of wakf namely irrevocability, perpetuity and inalienability.

1. The wakif should be the owner of the property dedicated.
2. The dedication must be for an object recognised by Muslim law as religious, pious or charitable.
3. The property must be of permanent character.
4. Contingent wakf are not valid.

Who can create Wakf: A major person of sound mind can validly create a wakf. The wakif (who creates a wakf) can be a muslim or non-muslim. A person suffering from death-illness can create a wakf (maraz-ul-maut wakf) such wakf takes effect as a bequest and only one third of the property is treated as given in wakf.

What can be made a wakf: The property may be of permanent character under the Wakf Validating Act 1913, both movable and immovable properties may be subjected to wakf. An undivided property (Mushaa) can be subjected to wakf except for two cases namely, wakf for the purpose of mosque and wakf for the purpose of burial ground.

Creation of a wakf: It is not necessary that a wakf should be made in writing. All that is necessary in constituting a wakf is that some sort of declaration either oral or in writing must be made. If the writing is non testamentary and relates to immovable property of value more than Rs.100, registration is essential.

Administration of wakf Mutawalli: The manager of wakf property is called the Mutawalli and he is generally appointed by the wakif or the court. Anyone, of any faith, female and male, who is competent to administer property may become Mutawalli. But where religious duties are involved, a person of another religion or a woman may be disqualified. The office of the mutawalli is not hereditary. However, if there is a custom hereditary succession would be allowed, mutawalli can be removed by the court, by the Wakf Board or by the walk.

Powers: A mutawalli can do everything that is reasonable and necessary for the protection and administration of the wakf. But his powers are subject to certain limitations i.e.,

a. He cannot alienate wakf property without the permission of the court or Wakf Board.
b. He cannot grant a lease or wakf property for more than a year in case of non-agricultural land, and for more than three years is ease of agricultural land, unless the court sanctions.
c. He cannot transfer his duties, functions and powers to anybody else, unless authorised by wakf deed or custom.
d. He cannot borrow money for spending it on beneficiaries, but can do so only for necessities, such as repairs etc.

Kinds of wakf:

a. Public wakf
b. Private wakf
c. Quasi public wakf.

Quasi public wakf (Wakf Alal_Aulad): a muslim can make a settlement on his descendants with an ultimate dedication for pious purpose to take effect of the line of the founder becomes extinct. Sec 3 of the Wakf Validating Act 1913, validates such family settlement provided the ultimate benefit is reversed for religion, pious and charitable purpose.

Legal incidents of wakf: There are three legal incidents of wakf ;

a) Irrevocability- According to Abu Yusuf the declaration of a wakf is in its nature irrevocable. A wakf cannot be revoked after declaration has been made, nor the power to revoke be validly reserved.

b) Perpetuity- Wakf must be perpetual . If it is for a limited period , or for a temporary purpose, it is void. Wherever the term wakf is used , permanence will be presumed as matter of law. The rule against perpetuity does apply over wakf.

c) Inalienability- As the wakf property belongs to God, no human beings can alienate it for his own purpose. Wakf property may be exchanged for an equivalent property, or sold, subject to the compulsory reinvestment of the price in another property. The mutawalli cannot alienate the wakf property without express authorisation by either the settler or the court.

The Wakf Act 1995: The act provides for the establishment of a board of wakf for each state and union territory of Delhi. The members of the board appointment by the State Government. The act places numerous checks on mutawallis. Sec 65 stipulates that , where no suitable person is available for appointment as mutawalli, the board may assume direct management of the wakf for a maximum period of 5 years.

FAMILY LAW II

MODEL QUESTION PAPER

Time: 2 ½ hours Maximum: 70 marks

Part-A- (2x12=24 marks)

Answer any two of the following in about 500 words each

1. Explain partition. When and by whom can partition be reopened.
2. Define Hiba and explain the requirements of a valid hiba .When hiba may be revoked.
3. State the rules of succession to the property of a Hindu male dying intestate.

Part-B (2x7=14 marks)

Answer two of the following in about 300 words each.

4. What is survivorship. How far it is affected by the Hindu Succession Act,1956.
5. Explain the different types of Legacies.
6. Enumerate the testamentary powers of a Muslim.

Part-C (5x4=20 marks)

7. Write short notes on Five of the following.
   a. Aprati banda daya.
   b. Women's estate
   c. Disqualification under The Hindu Succession Act 1956.
   d. Muttawali
   e. Privileged will.
   f. Doctrine of Aul
   g. Succession certificate.

Part-D (2x6=12 marks)

Answer two of the following by referring to relevant provisions of law and decided cases. Give cogent reasons.

8. A Hindu female dies intestate leaving her mother, husband, son and daughter of predeceased daughter. Distribute her property among her heirs.
9. A Shia Muslim dies leaving husband,father, mother and two daughters.Divide the estate among them.
10. A Christian women dies leaving her husband, two sons and two daughters and father. Divide his estate among them.

SCHEME OF VALUATION

Part A

Q.No. 1—Partiion meaning- to bring the joint family to status to an end. Two types- division in status and division by metes and bounds. Division in status effected by an –unequivocal expression of intention to partition, by institution of suit, by agreement , conversion, marriage to Hindu under The Special marriage Act. Division by metes and bounds-physical division,, formalites - taking of account and inventories . Reopening of partition-means to unite again. Only possible between father and son, between brothers and paternal uncle. When-property concealed by fraud, left out property. Who can reopen- son in the womb at the time of partition, adopted son, minor coparcener, absent coparcener , son conceived and born after partition.

Q.No.2—hiba- meaning transfer of certain existing moveable or immoveable property made voluntarily without consideration by donor to done followed by delivery of possession. Essentials of hiba- capacity of the parties, subject matter of hiba. Formalities of Hiba- Declaration by the done, acceptance by the donee and delivery of possession(when delivery not required).Revocation –possible-complete and incomplete gift i. e. before and after delivery. Before delivery can be revoked anytime. After delivery –by the consent of the done (exceptions), by court.

Q.No.3—Inestate meaning dying without leaving a valid will -Hindu Succession Act 1956- Heirs of Hindu male -classification of heirs-sec.8; Enumerate class 1, class11, class111 ,agnates and cognates. Rules of distribution sections 10 to 14.

Part B

Q.No.4—survivorship- mitakshara joint family –coparcenary- coparceners-classic law-when a coparcener in an undivided joint family dies leaving female heirs ,his interest shall devolve by survivorship to the remaning male members-changes made by Women's Right To Property Act 1937- widow given limited estate. Changes made Hindu Succession Act 1956-sec.6; notional partion-sec.30; testamentary powers given to coparceners-introduction of females as coparceners survivorship rule abolished.

Q.No.—5 Legacy –property received from a person who has died –either by will or gift. Classification- specific legacy, general legacy, demonstrative legacy. Specific legacy (sec.142)- testator bequeaths specific part of his property as distinguished from all other property; " The diamond ring given A", must be identifiable, liable to be adeemed. general legacy(171)- raised out of the general assets of the testator, "a diamond ring". Liable to be abated. Demonstrative legacy(sec.150)-where the legacy is directed to be paid out of specified property; "Rs 1000 out of the estate at Ramnagar". Liable to be adeemed.

Q.No.6- wasiyat- meaning will. Persons capable to make will-major, sound mind ,free will. For whom bequest can be made. subject matter-must be in existence. Testamemtary limitations –cannot bequeath to heirs except with consent of heirs and cannot will more than one third of the total asset. Difference between Sunni and Shia law.

Part C

Q.No.-7(a) Apritibanthadaya meaning-unobstructed heritage. Coparcenary property-explain. Mitakshara coparcenary- right by birth of putras in the ancestral property. other relatives, in presence of the putras have only an obstructed heritage.

Q.No.7(b)-Women's estate-Before 1956 property of women divided into stridhana and women's estate. Women's Right To Property Act 1937.Women's estate-includes property obtained by inheritance and

share obtained on partition. Features of women's estate- limited ownership, no power of alienation, on her death devolves to the heirs of the last full owner. women's estate abolished by sec.14 of the Hindu Succession Act 1956- women given absolute ownership over her property.

Q.No.7(c)-Disqualifications under the Hindu Succession Act1956- meaning disentitled to inherit as heir to the property of the intestate. Three type: 1.difference of religion(sec.26)- this disqualification was removed by The Caste Disability Act 1850 but does not extend to the converts descendants born after conversion. 2.Remarriage of certain widows though sec.24 is omitted still brother's wife on remarriage is disqualified.3. Murder (sec.25)- person who commits or abets commission of murder of the deceased intestate.

Q.No.7(d)-Mutawalli-manager of the wakf- appointed by the wakif or court. Who may be appointed-major Muslim or non Muslim . Powers- can all things reasonable for the protection of wakf, grant lease for specified period, cannot alienate wakf property without the permission of the court, borrow money for necessity. Removal-by court, by wakf board, by wakif.

Q.No.7(e)- privileged Will-sections 65-persons capable- soldiers of the armed forces who are employed in an expedition and completed 18 years. Mode of making-sec. 66 -orally, if written by testator signature not required, no attestation required, his instructions constitute valid will. Expiry- after one month if the testator survives.

Q.No.7(f)-Doctrine of Aul- Increase .Muslim law of inheritance allots fractional parts of unity, fractions added may equal to unity or more than unity or less. Shares of the respective heirs are or increased respectively is called as Aul. Give illustration.

Q.No.7 (g)-Succession certificate(sec.370)-granted by court with respect to debts Or security to which a person has become entitled-when to be granted- restrictions-application procedure- effect of the certificate.

Part D

Q.No.8- sec 15(1) Hindu Succession Act 1956.Husband gets 1/3,son gets 1/3 (per-capita division).the 1/3 share of the predeceased daughter is given to her two daughters- 1/3 divided by 2 =1/6 each (per-stripe division).Mother –nil sharer.

Q. No. 9- . Husband: 1/4 father1/6, mother: 1/6 ,two daughters 2/3.

Q.No.10 The Indian Succession Act,1925 sec.35.husband gets 1/3. The Remaining 2/3 is divided among the four children equally (lineal descendants), so they get 1/6 share each. Father –nil because of the presence of lineal descendants.

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