

JEWISH LAW OF INHERITANCE: IN INDIA AND ISRAEL

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ABSTRACT

There is a change in the normative view of familial relations all around the world. People are moving away from the standard view of family which is a man and woman with biological children. With these changes there is an increasing need for the law to adapt and change. The same is true for inheritance law as well. This paper focuses on providing evidence to above made statement by talking about succession laws of two countries- India and Israel. *The Indian Succession Act, 1925 and the Succession Law, 1965 are secular and fairly new laws catering to the Jewish community, however they adhere to only the traditional view of a family and are not able to meet the challenges faced by modern families.*

INTRODUCTION

Inheritance and its laws are central to the societal and legal institutions of approximately all societies around the world. These laws not only lay down the rules for succession of property after the death of the owner but also help define familial relations to a great extent. These laws provide legitimacy to familial relations by recognizing their existence in law. These laws also shape the hierarchical structures of families. These rules however were made and determined by the familial structure present at that point of time and became ill-suited for the modern and post-modern structures. With the change in family dynamics all around the world, there is a need for the law to adapt and change as well. However, there is not a lot of change that can be seen. The Indian Succession Act of India and the Succession Law of Israel are examples of this. These laws cater to the Jewish community at large and though they differ from classic Jewish law to a great extent in terms of equal treatment of men and women, these laws are unable to face the challenges created by the modern and post-modern world.

JEWISH LAW OF SUCCESSION IN INDIA

The Jewish Law of Succession in India is incorporated in the Indian Succession Act of 1925 and deviates to a great extent from the classic Jewish law of succession. Even though for the majority of the communities, matters of succession are dealt by their personal laws, the same is not true for the Jewish community. They are governed by a general secular Act. “Before the commencement of the Act in 1865, the Jewish community was governed by the English rules of succession.”ⁱ

THE INDIAN SUCCESSION ACT, 1925

1. Introduction

The Indian Succession Act is a secular Act which was enacted with the intention of applying to the whole of India. However, due to the Act containing a large number of exceptions it could not be applied to the whole of India. Apart from the Jewish community, this Act is applicable to the Indian Christians, Europeans, Armenians, Parsees, Anglo- Indians and persons marrying under the Special Marriage Act. Part II of the Indian Succession Act from Section 5 to Sections 9, deals with matters of international law and domicile. Part III of the Indian Succession Act is concerned with the consequences of marriage. The issue of consanguinity, lineal consanguinity and collateral consanguinity are all dealt with under Part IV of the Indian Succession Act. The Indian Succession Act does not recognize illegitimate relationships and the illegitimate children of the deceased. “The Act also does not distinguish between relations bases on the paternal and maternal side and between half-blood and full-blood relations.”ⁱⁱ “According to Section 27(c) of the Act, a posthumous child is in the same position as living children if he or she had been conceived at the stage at which the deceased dies, and was subsequently born alive.”ⁱⁱⁱ

2. Intestate Succession

2.1 General

Part V of the Indian Succession Act deals with matters of intestate succession. It is divided into three chapters. Chapter I is concerned with preliminary matters such as application of Part V of the Act and lays down the circumstances when intestate succession will occur. Chapter II includes the rules of division between the beneficiaries of the deceased person whose property is being dealt with.

2.2 Section 32

According to Section 32 of the Indian Succession Act, the property of the deceased devolves upon the husband or wife. In the absence of the husband or wide, the property is devolved upon the consanguinity of the deceased. The rules for devolution are laid down in Section 33 to 49 and are as follows:

“If his wife and no lineal descendants survive the deceased:” “She will inherit the whole of his estate.”^{iv} *“If his wife and lineal descendants survive the deceased:”* “She will inherit one third of his estate, and the remaining two thirds will be divided among the lineal descendants in terms of sections 37-40.”^v *“If the deceased is survived by his wife and no lineal descendants, but other consanguinity: She will inherit half of his estate, and the remaining half will be divided among the other consanguinity in terms of sections 41-48.”*^{vi} *“If the deceased died without a wife: His property will devolve upon his beneficiaries in the following order: Firstly, upon the lineal descendants. Secondly upon the consanguinity, other than the lineal descendants. Thirdly and lastly, upon the government of India.”*^{vii}

2.3 Distribution among lineal descendants

Section 25 defines lineal consanguinity as ,” Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.”^{viii} It further includes, “Every generation constitutes a degree, either ascending or descending.”^{ix} Section 37-40 caters to the rules relating to devolution of property when it comes to lineal descendants. The following situations may arise. *“If the children (lineal descendants in the first degree) survive the deceased:”*^x “If the deceased dies without a wife/husband, the whole of the estate devolves upon the children in equal shares or devolves as a whole upon an only child. If a wife/husband and children survive the deceased, the wife/husband inherits one third and the children inherit two thirds in equal shares or it devolves as a whole upon an only child.”^{xi} *“If grandchildren (lineal descendants in the second degree) survive the deceased:”*^{xii} “If only grandchildren survive the deceased, they inherit the whole of the estate in equal shares.”^{xiii} *“If only great-grandchildren and remote lineal descendants (lineal descendants in the third and more remote degrees) survive deceased:”*^{xiv} “The rule is that the nearer excludes the more remote, and that the descendants in the same degree inherit equally.”^{xv} *“If there are predeceased lineal descendants: Section 40 makes provision for the representation of predeceased lineal descendants.”*^{xvi}

2.4 Devolution of property if there are no lineal descendants

If the deceased is survived by a wife/husband, a widow's share, that is half of the estate, must be deducted before the residue of the estate is distributed among the other beneficiaries.^{xvii} Sections 42-48 contain the rules for devolution of property of the deceased if no lineal descendants are present. The rules are such that:” *If the father survives the deceased:*”^{xviii} “The father inherits the whole of the estate, except if the deceased is survived by a wife/husband, in which case the father will inherit half of the deceased's estate, and the wife/husband the other half.”^{xix} *If the mother, brothers and sisters survive the deceased:*”^{xx} “The wife/husband inherits half if she or he survives the deceased. The other half will be divided equally among the surviving mother, brothers and sisters. If there is no wife/husband, the brothers or sisters and the mother of the deceased will inherit the whole of the estate in equal shares.”^{xxi} *If the mother, brothers and sisters and children of predeceased brothers or sisters survive the deceased:*”^{xxii} “If the deceased is survived by a wife/husband, she or he inherits half of the estate, and the other half will be divided in equal shares among the brothers and sisters of the deceased. Any predeceased brothers and sisters will be represented by their parents and will inherit per stirpes.”^{xxiii} *If the mother and children of predeceased brothers and sisters survive the deceased:*”^{xxiv} “If the deceased is survived by a wife/husband, she or he inherits half of the estate and the other half will be divided in equal shares between the mother and children of the predeceased sisters and brothers. If there is no surviving wife/husband, the whole of the estate will be divided between the mother and children of the predeceased brothers and sisters.”^{xxv} *If the mother only survives the deceased:*”^{xxvi} “If the deceased is survived by a wife/husband, she or he inherits half of the estate, and the mother of the deceased will inherit the other half. If there is no surviving wife/husband, the mother of the deceased will inherit the whole of the estate.”^{xxvii} *If the brothers and sisters and children of brothers and sisters only survive the deceased:*”^{xxviii} “If the deceased is survived by a wife/husband, she or he inherits half of the estate, and the other half will be inherited by the brothers and sisters of the deceased. Predeceased brothers and sisters will be represented by their children. They inherit per stirpes. If there is no surviving wife/husband, the whole of the estate will be divided among the brothers and sisters. Again, the predeceased brothers and sisters may be represented by their children.

They inherit per stirpes.”^{xxix} *If the relatives other than the mother, father, lineal descendants, brothers and sisters survive the deceased.*^{xxx} “The rule is that the nearer relatives exclude the more remote.”^{xxxi}

3. Testamentary Succession

Part VI of the Indian Succession Act regulates the testamentary succession of the Jewish community in India. “According to Section 59 of the Act, everyone who is of sound mind and who has reached the age of majority may make a will.”^{xxxii} Section 59 further states that a married woman has the right to dispose of her property by means of will. The Indian Succession Act therefore enforces no restriction on the capacity of an individual to create a will based on their sex or matrimonial status. It provides equal freedom of testation to both males and females.

4. Same-sex couples, live-in relationships and step-families

The law in India does not allow for marriage between two people of the same sex. The Indian Succession Act moreover does not recognise the concept of live-in relationships. Live-in relationships are only recognised under the Hindu Succession Act through caselaw. The lack of legislation therefore creates a lot of challenges for these kinds of couples.

5. Conclusion

The Indian Succession Act which lays down the rules of inheritance for the Jewish community deviates a great deal from the personal laws. A notable observation is that the Act does not discriminate between male and female beneficiaries. The Act however can be discriminatory when it favours the father of the deceased in case no lineal descendants are present. He also has to share the property only with a surviving partner. On the other hand, the mother of the deceased person will only inherit the property if the father is predeceased. Moreover, the Act does not recognize the existence of same-sex couples, couples in live-in relationships who might have children and even step-families where a formal adoption has not been done. The Act despite being secular and aimed at creating a more uniform code does not take into consideration that various types of families that are emerging. This, as a result creates a lot of

challenges for these kinds of families. These families lack recognition in the eyes of law as legitimate familial structures and creates a tension between the legal rules and the newly developing familial structures.

JEWISH LAW OF SUCCESSION IN ISRAEL

History of Jewish succession law in Israel

Before the Law of Succession was implemented in 1965 the Israeli succession was governed by the Moses' legislation. This ancient legislation was formed in one of most decisive periods of Jewish History. Over time this law was influenced by various foreign laws. The rules of descent and distribution were therefore composed of the diverse and out of place elements. Due to its extreme heterogeneous and incongruous nature, there was a need for a more uniform code of succession. Thus, the Succession Law came into place.

Succession Law 1965

Like in India, there are two methods of devolution of property of the deceased: by the creation of a will or through the intestate succession rules. The succession laws in Israel are governed by the Succession Law of 1965.

1. Intestate Succession

1.1 General

There are generally two approaches when rules are being made for intestate succession. The dominant approach or the American approach prevails in Israel. Under this approach the rules should follow the presumed will of the testator. 1995: 116). "The rules thus are supposedly no more than a 'constructive default will' that each testator may accept or reject." ^{xxxiii} Therefore, law makers in Israel are expected to simply fulfil the wished of the testator and not concern themselves with fairness, equality or pluralism.

Another approach focuses on the expressive function of the law and of the rules of intestate succession. According to this method, the preferences of the people are not external to the rules and that the rules always influence the people's preferences and choices. According to this approach, the intestate rules are powerful default rules.^{xxxiv} These rules control the distribution of property even when no will has been made. According to this approach, the law makers should keep in mind the normative consequences of fairness and equality.

1.2 Rules of Kinship

According to the Israeli succession law, a family is compounded of two spheres. One is the conjugal model based on partnership. The other is a dynastic model, which is based on kinship and includes all the ascendants and descendants. According to Section 11 and 13 of the Succession Law, the descendants of the deceased can take the entire estate if the deceased has no surviving spouse. If the deceased is survived by a spouse, then the descendants are entitled to the property not passing onto the spouse. According to Section 12 of the Succession Law states that if the deceased has no children or descendants then the deceased parents and their descendants are next in line and following them the deceased grandparents and their descendants. If the owner has descendants or parents, the spouse is entitled to half of the estate. "If there are only siblings and their descendants or who outlive the decedent, the spouse is entitled to two-thirds of the estate."^{xxxv} In accordance to Section 11, if the deceased has no descendants, parents, siblings or grandparents, the entire estate is passed down to the spouse. "The spouse also receives the chattel (movable property), including the car, which belonged to household. We can see, then, that the spouse is considered a very significant relationship in the distribution of family property."^{xxxvi}

These rules are a reflection of a traditional vision of a family. Biological closeness is the standard and is given preference over other kinds of relations, like for example, adoption. Adoption is treated as an exception to the general rules of kinship. According to Section 16 of the Succession Law, adopted children can inherit from their adoptive parents but cannot inherit from other relations formed out of theta adoption such brother, sisters, grandparents. This Section was only amended in 2012 which removed the discrepancy between adoptive and

biological children. The adopted children are entitled to inherit from their biological parents. This also works towards the traditional view of the family, where the child even after adoption remains the part of the biological family. An even bigger challenge is created by step families and foster families. Thus, modern families, which include same-sex parents or step parents face challenges as the rules are made keeping in mind only the traditional for of families. “A partner who is not the bio logical parent of a child will not be considered a parent for inheritance purposes unless he or she has completed an official adoption procedure.”^{xxxvii}

1.3 Rules of Partnership

While the rules related to kinship are very strict, the law takes a much more liberal approach when it comes to partnership. According to Section 55, opposite-sex couples are considered cohabitants and are entitles to same share if they would have been spouses. Israeli law also acknowledges same-sex couples as inhabitants. Even though the statute mentions “a man and a woman”, a court ruling of Estate of S.R. v. Attorney General said that the phrase is not to be taken literally and can include same-sex couples also. Therefore, Succession Law acknowledges the existence of family without a formal marriage. Even though Israel does not allow for same-sex couples to get married, it allows for them to get married in another country and then register their marriage. This allows the marriage to have an official status. Therefore, for the purpose of inheritance, dame-sex marriage are considered the same as opposite-sex marriages. The intestate rules do not cater to several family types. Nuclear families are the standard and extended family is often marginalised. Even though there is a change in the type of families that are coming up, the inheritance law does not seem to adapt to these changes. Step-families, foster families and families where one parent is not biologically related to the children.

2. Testamentary Succession

Succession Law of Israel like the Indian Succession Act allows for the owner of the property to create a will. In order to do so, the owner should be an adult, free from any kind of duress, fraud, or undue influence and should be mentally capable of executing a will. The owner has

the right to distribute their property according to their wishes as long as it is in accordance to the law.

3. Conclusion

Due to the extreme diverse nature of inheritance laws in the country before 1965, there was a clear need for a more uniform code that the country could call its own. The existing laws at that time were simply a mixture of foreign laws and didn't quite fit with the community at large. The Succession Law in Israel is a fairly new one and caters to the traditional forms of families with biological children. Even though there is a change in trend with new types of families emerging such as live-in couples, same-sex couples, step-families and so on, not a lot of change can be seen in the legal front. Similar to India, these emerging familial structures lack legal recognition as legitimate families. This creates obstacles in their journey of getting accepted by the society at large and also creates tension between the law and the society. Even though Turkish laws are more liberal than its Indian counterpart they still have a long way to go.

CONCLUSION

Inheritance as we have seen is central to the society and legal institutions all around the world. As the world moves towards modernization, there is an increasing change in how the personal lives of people are framed. More and more people are moving away from the traditional view of family, it being a man and woman with biological children. With same-sex couples getting increasing legal recognition around the world, with an increase in live-in relationships that result in offspring and step-families there is a need for the law to adapt to these changes. The same goes for inheritance laws. the existing laws, such as the Indian Succession Act and the Succession Law of Israel. These laws cater to the classical view of the family only. These set rules provide meaning and recognition to familial relations. If these laws are not inclusive of the types of families which are different from the norm, it creates a rift in the society. Law as a tool is one of the most effective one to fix the rift which occurs in the society when it comes

to cultural aspects. If law recognises these new kinds of families, then it sends a social message which allows for the rest of the society to begin the process of acceptance as well. When the law recognizes cohabitants or same-sex marriages, it actually helps the society in recognizing them as acceptable forms of familial relations. The problem with the law is their ‘one-size-fits-all’ criteria. This does not allow the subjects to live their lives on their own terms. Individual circumstances can be very distinct from what is expected of them according to the established societal norms. The laws therefore need to be, firstly, more flexible in its application and secondly, adapt to the changes which are taking place all around the world.

ENDNOTES

ⁱ Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 127

ⁱⁱ Indian Succession Act 1925, s 27(a) and (b)

ⁱⁱⁱ Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 129

^{iv} Indian Succession Act 1925, s 33(c)

^v Indian Succession Act 1925, s 33(a)

^{vi} Indian Succession Act 1925, s 33 (b)

^{vii} ^{viii} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 130

^{viii} Indian Succession Act 1925, s 25

^{ix} Indian Succession Act 1925, s25

^x Indian Succession Act 1925, s 37

^{xi} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 130

^{xii} Indian Succession Act 1925, s 38

^{xiii} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 130

^{xiv} Indian Succession Act 1925, s 39

^{xv} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131

^{xvi} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131

^{xvii} Indian Succession Act 1925, s 33 (b)

^{xviii} Indian Succession Act 1925, s 42

^{xix} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131

^{xx} Indian Succession Act 1925, s 43

^{xxi} Christa Rautenbach, ‘Indian succession laws with special reference to the position of females: a model for South Africa?’ [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131

^{xxii} Indian Succession Act, s 44

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- ^{xxiii} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131
- ^{xxiv} Indian Succession Act 1925, s 45
- ^{xxv} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 131-132
- ^{xxvi} Indian Succession Act 1925, s 46
- ^{xxvii} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 132
- ^{xxviii} Indian Succession Act 1925, s 47
- ^{xxix} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 132
- ^{xxx} Indian Succession Act 1925, s 48
- ^{xxxi} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 132
- ^{xxxii} Christa Rautenbach, 'Indian succession laws with special reference to the position of females: a model for South Africa?' [2008] 41(1) *The Comparative and International Law Journal of Southern Africa* 105, 132
- ^{xxxiii} Shelly Kreiczer-Levy, 'Law in Israel: Individualism and the Family' [2013] 28(2) *Israel Studies Review* 300, 302
- ^{xxxiv} Shelly Kreiczer-Levy, 'Law in Israel: Individualism and the Family' [2013] 28(2) *Israel Studies Review* 300, 302-303
- ^{xxxv} Shelly Kreiczer-Levy, 'Law in Israel: Individualism and the Family' [2013] 28(2) *Israel Studies Review* 300, 303-304
- ^{xxxvi} Shelly Kreiczer-Levy, 'Law in Israel: Individualism and the Family' [2013] 28(2) *Israel Studies Review* 300, 304
- ^{xxxvii} Shelly Kreiczer-Levy, 'Law in Israel: Individualism and the Family' [2013] 28(2) *Israel Studies Review* 300, 304